Federal Court  Cour fédérale

Date: 20190626

Docket: IMM-3887-18

Citation: 2019 FC 859

Ottawa, Ontario, June 26, 2019

PRESENT: Madam Justice Walker

BETWEEN:

MUSAB OSMAN MOHAMED ALI
HIND ELFATIH OSMAN ELNOR
YASIN MUSAB OSMAN MOHAMED

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

JUDGMENT AND REASONS

[1] The Applicants are citizens of Sudan. They seek judicial review of a decision (Decision) of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada. The RPD found that the Applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97, respectively, of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 (IRPA). The application for judicial review is brought pursuant to subsection 72(1) of the IRPA.

[2] The Applicants are: Musab Osman Mohamed Ali (Principal Applicant); his wife, Hind Elfatih Osman Elnor (Ms Elnor); and their son, Yasin Musab Osman Mohamed (Yasin). The Principal Applicant and Ms Elnor also have a daughter, Caddy Musab Osman Mohamed. The RPD found that Caddy was a Convention refugee pursuant to section 96 of the IRPA as she faced a serious possibility of female genital mutilation (FGM) in Sudan. Therefore, her refugee claim was accepted and is not in issue before me.

[3] For the reasons that follow, the application will be allowed.

I. Background

[4] The Applicants arrived in Canada on August 24, 2017 from the United States and applied for refugee status. The Principal Applicant fears persecution by the National Intelligence and Security Services (NISS) in Sudan due to his political activities that date back many years. Ms Elnor and Yasin largely base their claims on the Principal Applicant's narrative.

[5] The Principal Applicant joined activist student groups while studying at the University of Khartoum and was detained three times during his studies (2001-2002). Following his graduation, the Principal Applicant continued to advocate for certain causes, including the Committee for the Fight Against Dams Construction (Committee) of the Mahas Club. In 2006, after an attempt to deliver a protest letter to the Minister of Investment in Khartoum, he was

detained for two days. During his detention, he was beaten and slapped by the NISS until he signed an undertaking to refrain from participating in anti-dam activities. Ms Elnor was also detained in 2006 during a separate attempt to submit a protest letter to the Ministry but was released after signing her own undertaking to cease activities against the state.

[6] In March 2007, the Principal Applicant accepted a civil engineering position in Muscat, Oman. He moved to Oman but continued to be involved with the Committee by helping to raise money for its activities in Sudan. In 2009, he joined the Zoal Initiative which provides funds and used clothing for Darfurian refugees.

[7] The Principal Applicant returned to Sudan four times between 2007 and 2011. During his January 2011 trip, he distributed funds and clothing on behalf of the Zoal Initiative.

[8] On August 17, 2012, the Principal Applicant travelled to Sudan with more Zoal Initiative funds and clothing. Upon arrival at the airport, he was detained by airport security and was told "be careful, we know what you are doing". The Principal Applicant paid 2.2 million Sudanese pounds to a friend who obtained an exit visa and escort out of the airport for him. Despite this incident, the Principal Applicant returned to Sudan in January 2013 to marry Ms Elnor and encountered no difficulties entering or leaving the country.

[9] On November 21, 2014, the Principal Applicant and his wife travelled to Sudan to introduce their infant son, Yasin, to their families. The Principal Applicant alleges that he was arrested by plainclothes officers at the Khartoum airport and detained for three days during

which he was beaten, kicked and slapped, and interrogated about his association with the Zoal Initiative. The Principal Applicant was released and reported to security headquarters on November 24 and 26, 2014. After paying 1.5 million Sudanese pounds to an officer, he was able to arrange for an exit visa and left the country on November 28, 2014. He has not since returned to Sudan.

[10] Ms Elnor and Yasin remained in Sudan for one month following the Principal Applicant's departure.

[11] Ms Elnor has travelled to Sudan several times since the Principal Applicant's detention in November 2014. On her last visit, she had difficulty obtaining an exit visa to return to Oman as she did not have a letter from the Principal Applicant. Rather than obtaining the letter, Ms Elnor bribed a security officer to allow her and the children to board their flight.

[12] In early 2017, the Principal Applicant travelled to Canada for work (February 24, 2017 to March 15, 2017). The work trip prompted him to consider a North American family vacation. As he and his family were preparing for the vacation, the Principal Applicant was informed he was to lose his job due to downsizing. As a result, the Applicants decided to travel to the United States and cross into Canada to claim refugee protection.

II. Decision under review

[13] The Decision is dated July 23, 2018. The RPD concluded that the Principal Applicant, Ms Elnor and Yasin were neither Convention refugees nor persons in need of protection pursuant

to sections 96 and 97 of the IRPA. The basis for the panel's conclusion was the Applicants' failure to establish a well-founded fear of persecution in Sudan due to the Principal Applicant's political opinion and activities.

[14] The Decision is best summarized in two parts. The RPD first reviewed the Applicants' documentary evidence in support of their claims. Second, the panel considered the repeated reavailment to Sudan from Oman by the Principal Applicant and Ms Elnor.

[15] The documentary evidence consisted of a General Call Up summons (Summons) issued in the Principal Applicant's name dated December 3, 2014, a letter from the Committee (Mahas Club), and two letters from the Zoal Initiative.

[16] The RPD reviewed the Summons, noting that it listed "*procedures*" as the reason for the Principal Applicant's required appearance before the Community Security Court scheduled for December 17, 2014. The panel observed that the Applicants had provided no other legal documents from the Sudanese authorities which might have confirmed that they continued to seek the Principal Applicant. In addition, when the panel asked the Principal Applicant about attempts by the authorities to find him, his testimony that his family in Sudan had noticed strange cars in the neighbourhood was dismissed as speculative.

[17] The RPD found that the letter from the Mahas Club did not set out the Principal Applicant's ties to the Club or the Committee, although it did reference the fact that the Principal Applicant had been detained as a result of his involvement in the Committee's resistance

activities. The RPD gave the letters from the Zoal Initiative little weight as they were form letters that simply named the Principal Applicant and Ms Elnor as members.

[18] In summary, the RPD found that the Principal Applicant and Ms Elnor had presented only two form letters from the Zoal Initiative and their narratives to corroborate a current, visible political profile, despite their long involvement in the group. The panel concluded that there was "insufficient objective evidence to support visible political profiles for the adult claimants, from the perspective of the authorities of Sudan".

[19] The RPD then considered the Applicants' numerous trips to Sudan since leaving for Oman. The panel noted that the Principal Applicant was detained in Sudan four times between 2001 and 2006 yet made six subsequent trips for various personal reasons; a course of conduct that militated against a finding that he feared returning to Sudan. The RPD acknowledged that the Principal Applicant paid a bribe to arrange an exit visa and airport escort to leave Sudan in August 2012 and briefly reviewed his two final trips to Sudan. The panel stated that it would have expected a person who feared returning to Sudan to have avoided the country or to have taken precautions against interactions with the authorities. The panel concluded that "the principal claimant did not have a subjective fear of returning on each of his six return trips (when he was a resident of Oman)".

[20] The RPD reviewed Ms. Elnor's testimony that she did not currently face any problems in Sudan. The panel asked about her three trips to Sudan after the Principal Applicant's November 2014 detention and she testified that she brought her children on all three trips, other than the

March 2015 re-entry, which took place prior to the birth of her daughter. The RPD concluded its analysis as follows:

> [42] As such, the panel finds insufficient objective evidence has been adduced to tie the adult female claimant or the minor claimants to risk of harm in Sudan, based on political opinion. For clarification, the panel does not find that either of the adult claimants has drawn the negative attention of the authorities of Sudan, or that they face a forward-looking risk of harm in Sudan from the authorities.

III. Issues

[21] The Applicants raise a number of arguments in this application which I have organized as follows:

1. Were the RPD's assessment of the Applicants' evidence and conclusion that the Principal Applicant had not established a subjective fear of returning to Sudan reasonable?
2. Did the RPD err in failing to conduct a separate section 97 analysis of the Applicants' claims?

IV. Standard of review

[22] The standard of review applicable to the RPD's assessment of the evidence and its findings regarding the Principal Applicant's lack of subjective fear is reasonableness (*Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at para 13 (*Kaur*); *Jean-Baptiste v Canada (Citizenship and Immigration)*, 2018 FC 285 at para 11).

[23] The issue of whether the RPD was required to conduct a separate section 97 analysis is also reviewed against the standard of reasonableness (*Velez v Canada (Citizenship and*

Immigration), 2010 FC 923 at para 22; *Paramananthalingam v Canada (Citizenship and Immigration)*, 2017 FC 236 at para 10).

V. Analysis

1. Were the RPD's assessment of the Applicants' evidence and conclusion that the Principal Applicant had not established a subjective fear of returning to Sudan reasonable?

[24] The Applicants rely principally on two arguments in submitting that the RPD erred in its assessment of their evidence and in its conclusion regarding the Principal Applicant's lack of subjective fear of returning to Sudan. First, the Applicants argue that the RPD improperly dismissed the probative value of the Summons in establishing that the Sudanese authorities continue to pursue the Principal Applicant. Second, they argue that the panel's reliance on the Principal Applicant's recurring trips to Sudan fails to recognize the importance of his final trip in November 2014 as the catalyst for his fear of returning.

[25] For the reasons that follow, I find that the RPD's assessment of the Summons, and the Applicants' documentary evidence generally, was reasonable. However, I find that the panel's failure to consider the Principal Applicant's evidence of detention and abuse during his final trip to Sudan in 2014 was a substantive omission that is determinative in this application. I am unable to determine whether the RPD's refusal of the Applicants' claims was a reasonable and possible outcome on the evidence before the panel. Therefore, the Decision was not reasonable.

General Call Up Summons

[26] The RPD discussed the Summons in paragraphs 25 and 26 of the Decision:

> [25] The panel reviewed the presented *General Call-Up* summons, issued in the name of the principal claimant. It listed *procedures* as the reason for the request for him to appear on December 17, 2014. There were no further legal documents adduced from the authorities of Sudan, which might have confirmed that the authorities continued to seek the principal claimant in Sudan. The panel notes that the parents and three younger sisters of the principal claimant continue to reside in Khartoum, and as such, it would be reasonable to expect visits from authorities, if they were seeking the principal claimant.
>
> [26] When the principal claimant was asked about attempts by authorities to pursue him in Sudan, he testified that his family noticed strange cars until the beginning of 2017. The panel finds that any association between strange cars seen by the principal claimant's family members and interest in the principal claimant (by the authorities) is purely speculative. In this regard, the panel notes that the original *General Call-Up* summons was handed to the principal claimant's sister at her home. As such, it would be reasonable to expect direct contact or questioning by the authorities, if they were interested in the location of the principal claimant.

[27] The Applicants submit that the RPD erred in requiring the Applicants to explain why Sudanese security officials did not visit the Principal Applicant's family in Khartoum to look for him. They argue that he should not be required to explain the actions, or inaction, of an agent of persecution (*Franco Taboada v Canada (Citizenship and Immigration)*, 2008 FC 1122 at para 35 (*Franco Taboada*); *Builes v Canada (Citizenship and Immigration)*, 2016 FC 215 at para 17 (*Builes*)) and that the Summons itself is evidence that he is being sought by the Sudanese authorities. The Applicants also state that the panel erred in dismissing the Summons without considering its probative value.

[28] Despite the Applicants' arguments, I find that the RPD's assessment of the Summons was reasonable. I first note that the panel did not dismiss the Summons, nor did the panel dispute its authenticity. Rather, the Summons alone was not sufficient to establish that the Sudanese authorities had a continuing interest in the Principal Applicant.

[29] The Applicants' refugee claims are based on their assertion of a well-founded fear of political persecution in Sudan because the Principal Applicant is being sought by Sudanese authorities. The Summons was the only documentary evidence of official interest in the Principal Applicant before the RPD. It was issued in 2014 and provided little information as to the reason for which he was summoned to appear before the Court. It referenced only "*procedures*" and contained no reference to any alleged political activity.

[30] The Principal Applicant did not appear before the Court in December 2014 as required and the panel asked for information concerning the Sudanese authorities' post-hearing interest in him. The only information proffered by the Principal Applicant was his testimony that his family had noticed strange cars in the neighbourhood, information that was reasonably discounted by the panel as speculation.

[31] The RPD had no evidence that the Principal Applicant remained of interest to the government or its security forces after 2014. In this context, the statements by the panel that it would have expected some follow-up by the authorities were not unreasonable.

[32] This Court's decisions in *Franco Taboada* and *Builes*, both cited by the Applicants, are distinguishable for the following reasons. In *Franco Taboada,* the RPD had questioned why a second kidnapping occurred as, in its view, the first kidnapping would have accomplished the goals of the kidnappers. Justice O'Keefe held that the panel's finding of implausibility was not reasonable as the panel had not identified any valid reason for doubting the applicant's story. The applicant was not required to prove that his agents of persecution would act rationally. In the present case, the RPD did not question the Applicant's evidence; it simply highlighted the lack of evidence regarding ongoing risk.

[33] In *Builes,* Justice Phelan found that the RPD had speculated about the motives, means and future intentions of the agents of persecution. His summary of the error on the part of the panel is instructive and demonstrates the differences between the RPD's decision in *Builes* and the Decision in this case (at paras 16-17):

> [16] As noted in *Londono v Canada (Citizenship and Immigration),* 2008 FC 354, 166 ACWS (3d) 343, determinations on the plausibility of who will be attacked and when must be made with caution because of the difficulty of predicting who will be targeted and for what level of involvement.
>
> [17] The RPD speculated, without any basis, as to the agents of persecution's motives, means and future intentions. They assumed that, if they were right about motive (to stop human rights work), they would behave sensibly and rationally towards the Applicants. There is no evidence to support any of this.

[34] In the present case, the RPD's statements regarding the absence of any follow-up action by the Sudanese authorities following the Principal Applicant's missed court date were made in the absence of any evidence of post-2014 actions or interest on the part of the authorities. As the Applicants bore the onus of establishing their subjective fear of persecution if they were to return

to Sudan, it was reasonable for the RPD to expect current evidence to support that subjective fear.

[35] I would add briefly that I find no error in the RPD's assessment of the Applicants' other documentary evidence. The letter from the Committee referred to the Principal Applicant's detention and release on unnamed dates due to his activities on behalf of the Committee but provided no detail or dates regarding his involvement. The two letters from the Zoal Initiative were properly characterized as form letters into which the names of the Principal Applicant and Ms Elnor had been inserted.

Reavailment

[36] The Applicants submit that the RPD erred in its review of the Principal Applicant's travel history to Sudan since 2006. Their submission centres on his final trip in November 2014 during which he was detained for three days, beaten and otherwise abused by the Sudanese authorities. The Applicants argue that the panel neither analysed the Principal Applicant's evidence of what occurred during that trip nor considered the fact that, as a result of the detention and abuse he suffered, he has not since returned to the country. The Applicants state:

> 23. While the Principal Applicant did encounter some problems both as a student and before his departure to Oman, the catalyst of his fear of returning to Sudan was his detention and torture during his November 2014 visit.
>
> 24. As such, his subjective fear of returning to Sudan can clearly be observed by the fact that he has yet to return to Sudan. Therefore, the Board's conclusions as to the Principal Claimant's lack of subjective fear are demonstrably unreasonable.

[37] The RPD described six trips to Sudan by the Principal Applicant from 2006 onwards and stated that it would not have expected a person with a visible political profile to re-enter Sudan on multiple occasions. The panel noted the warning received by the Principal Applicant on August 17, 2012 and his payment of a bribe to arrange an exit visa and airport escort in order to exit the country. The panel also noted that he returned to Sudan in January 2013 and November 2014 despite the increased interest of the Sudanese airport officials. The RPD found that his explanations for his 2013 and 2014 trips to Sudan were not reasonable:

> [40] Despite these described exit precautions taken in 2002, the panel finds the explanations regarding the principal claimant's January 2013 and November 2014 returns to Sudan to be unreasonable. The panel would have expected a person with a fear of returning to Sudan to have avoided returning to Sudan, or to have taken precautions involving the expected interaction with the airport authorities. As such, the panel finds that, on a balance of probabilities, the principal claimant did not have a subjective fear of returning on each of his six return trips (when he was a resident of Oman).

[38] At first blush, the Principal Applicant's repeated returns to Sudan undermine his claim that he now fears the authorities. However, I find the Applicant's argument that the RPD nevertheless erred in its reavailment analysis persuasive. The events of November 2014 were a central aspect of the Principal Applicant's narrative and the RPD was required to address the importance and relevance of those events in assessing his fear of returning to Sudan (*Sothinathan v Canada (Citizenship and Immigration)*, 2015 FC 154 at paras 24-26). Its failure to do so was a reviewable error which requires redetermination of the Applicants' claims.

[39] The RPD acknowledged the November 2014 detention and beating suffered by the Principal Applicant but made no mention of those facts in its reavailment analysis. If the panel

did not believe the Principal Applicant, it was required to so state. The Respondent argues that the panel did make credibility findings regarding the Principal Applicant's evidence but that they were implicit, not explicit. In my view, an implicit finding in the Decision is not sufficient given the importance of this event in the evidence.

[40] The Principal Applicant's numerous trips to Sudan led directly to the RPD's conclusion that "on a balance of probabilities, the principal claimant did not have a subjective fear of returning on each of his six trips (when he was a resident of Oman)". In reaching its conclusion, the RPD focussed on the number of times the Principal Applicant travelled to Sudan, apparently without fear, and appears to have weighed each of the trips equally.

[41] The Principal Applicant does not contest that he had only some concern about entering Sudan on his early trips. However, an individual's fear of persecution may change over time. In the present case, the Principal Applicant alleges that his fear of persecution grew from the increased, and eventually brutal, interest and actions of the Sudanese authorities in August 2012 and November 2014. The RPD did not consider the alleged escalation of interest on the part of the Sudanese government in 2012-2014 and the Principal Applicant's resulting decision not to travel to Sudan in its reavailment analysis. The Decision lacks transparency as the Applicants are unable to determine whether the panel considered the nature and importance of the November 2014 detention. While I do not accept the Applicants' argument that the Principal Applicant's pre-November 2014 trips to Sudan were irrelevant to the RPD's consideration of this issue, the RPD was required to assess the earlier trips in the context of the Principal Applicant's allegations of subsequent mistreatment.

2. Did the RPD err in failing to conduct a separate section 97 analysis of the Applicants' claims?

[42] The error in the RPD's consideration of the Principal Applicant's subjective fear of returning to Sudan is determinative in this matter but I will briefly address the Applicants' submission that the panel also erred in failing to conduct a separate section 97 analysis of their claims.

[43] The Applicants submit that the RPD's negative credibility findings were not necessarily dispositive of a claim for protection pursuant to section 97 of the IRPA (*Kandiah v Canada (Minister of Citizenship and Immigration),* 2005 FC 181 at paras 14-16). The Respondent submits that there is no obligation for the RPD to conduct an additional section 97 analysis where an applicant's allegations regarding their section 97 claim are the same as those advanced in their section 96 claim (*Kaur* at paras 50-51).

[44] In *Kaur*, Chief Justice Crampton held that there is no categorical duty to conduct a separate section 97 analysis in every case (at para 50):

> [50] The Board is not obliged to conduct a separate analysis under section 97 in each case. Whether it has an obligation to do so will depend on the circumstances of each case (*Kandiah v Canada (Minister of Citizenship and Immigration),* 2005 FC 181 (CanLII) at paras 16, 137 ACWS (3d) 604). Where no claims have been made or evidence adduced that would warrant such a separate analysis, one will not be required (*Brovina v Canada (Minister of Citizenship and Immigration),* 2004 FC 635 at paras 17-18, 254 FTR 244; *Velez*, above at paras 48-51).

[45] In the present case, the basis of the Applicants' claims is fear of persecution in Sudan due to political opinion which is a section 96 nexus. A section 97 analysis by the RPD would have been based on the same facts, allegations and evidence, and would have resulted in the same outcome. The Applicants presented no claims that would warrant a separate section 97 analysis. As stated by Justice Gibson in *Kulendrarajah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 79 at paragraph 13 (*see also*, *El Achkar v Canada (Citizenship and Immigration)*, 2013 FC 472 at paras 29-32):

> [13] The sole bases for the principal Applicant's claims are Convention grounds, that is to say, ethnicity and membership in a particular group. Since I am satisfied that the RPD's credibility analysis and analysis of risk to the principal Applicant in Colombo is sufficient to support its conclusion that the principal Applicant is not at risk of persecution based on a Convention ground if she were required to return to Sri Lanka, it follows that she is equally not a person in need of protection because no other ground to support a need of protection other than a Convention ground was advanced on her behalf and the alleged Convention grounds are not sustainable by reason of the credibility finding. While a more extensive explanation for the RPD's conclusion regarding "person in need of protection" in relation to the principal Applicant might well have been desirable, I am satisfied that its absence does not constitute reviewable error.

[46] I find that the RPD made no error in omitting to undertake a separate section 97 analysis of the Applicants' claims.

VI. Conclusion

[47] The application will be allowed.

[48] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-3887-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3887-18
STYLE OF CAUSE:	MUSAB OSMAN MOHAMED ALI, HIND ELFATIH OSMAN ELNOR, YASIN MUSAB OSMAN MOHAMED AND CADDY MUSAB MOHAMED v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 6, 2019
JUDGMENT AND REASONS:	WALKER J.
DATED:	JUNE 26, 2019

APPEARANCES:

Richard Wazana	FOR THE APPLICANTS
Judy Michaely	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Wazana Law Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT