Yusuf v. Canada (Minister of Employment and Immigration)
(C.A.)

Sarah Mohamed (Abshir) Yusuf (Appellant)
v.
Minister of Employment and Immigration of Canada (Respondent)

[1992] 1 F.C. 629
[1991] F.C.J. 1049
Court File No. A-1116-90

Federal Court of Canada - Court of Appeal
Marceau, Hugessen and MacGuigan JJ.

Heard: Montreal, October 16, 1991.
Judgment: Ottawa, October 24, 1991.

Judicial review — Refugee Division of Immigration and Refugee Board manifesting sexist attitude in cross-examination of claimant — Sexism, condescension toward women unacceptable in quasi-judicial proceeding — Giving rise to reasonable apprehension of bias.

Immigration — Refugee status — Application based on brother's, own dissident activity, religion — Refugee Division denying application on ground applicant's testimony as to subjective fear of persecution not credible — Definition of refugee comprising both subjective fear and objective foundation — Whether status may be refused for want of subjective fear where objective danger of persecution — Decision set aside where reasonable apprehension of bias resulting from panel members' sexist, irrelevant remarks.

This was an appeal from a decision of the Refugee Division of the Immigration and Refugee Board rejecting the appellant's claim to refugee status.

The appellant, a Somalian national, testified at the hearing that her brother had participated in an attempted coup d'état against the regime of Siad Barré, at that time president of Somalia. The brother later became president in exile of the Front Démocratique pour le Salut de la Somalie. The appellant had engaged in some dissident activity herself. She also claimed to have been subject to persecution by reason of her religion, Islam. The Division held that, although there was objectively danger of persecution given the existing state of civil rights in Somalia, the claimant's testimony as to her subjective fear of persecution was not credible. Two-thirds of the transcript of the hearing was taken up with the members' questions to the appellant, questions which the

Court herein characterizes as "injudicious" in both content and tone. The members addressed the claimant as "my dear lady" and described her as "a tiny little woman".

Held, the appeal should be allowed.

The definition of Convention refugee comprises both a subjective and an objective element; that is, a person is not entitled to refugee status because he subjectively fears persecution unless he also demonstrates that fear to be objectively well founded. The reverse, however, is doubtful: a person who is objectively in danger of persecution should not be denied status because, whether out of courage or because of mental incapacity, that person is said not to be subjectively afraid. Here, the Division did not fall into such an error; rather, because it considered the claimant not to be a credible witness, it did not accept her testimony as to the danger of persecution for her personally should she return to her home country.

While there can be no doubt that the members of the Division have the right to cross-examine witnesses, the panel made harassing remarks and asked unfair questions, thus going beyond what would be permitted even of opposing counsel in an adversarial proceeding. While that, by itself, might not suffice to support a finding of bias on the part of the Division, some of the remarks made by panel members were sexist, unwarranted, and irrelevant. These were such as to create an impression of bias on the part of their originator. Sexist attitudes, and condescension toward women in general, are unacceptable in judicial proceedings in Canada today. Such attitudes on the part of a decision-maker give rise to a reasonable apprehension of bias.

Cases Judicially Considered

Referred to:
Mahendran v. Canada (Minister of Employment and Immigration), A-628-90, F.C.A., Heald J.A., judgment dated 21/6/91, not yet reported.

Counsel:

Daniel Payette, for appellant.
Normand Lemyre, for respondent.

Solicitors:

Payette, Bélanger, Fiore, Montreal, for appellant.
Deputy Attorney General of Canada, for respondent.

The following is the English version of the reasons for judgment rendered by

1 **HUGESSEN J.**:— This is an appeal from a decision by the Refugee Division of the Immigration and Refugee Board, which dismissed the appellant's claim.

2 The appellant is a Somali national who is now thirty years old. She says she fled her native country because she feared being persecuted by the regime of Siad Barré then in power. Her elder brother had been an active participant in a failed coup d'état against the regime, and after fleeing the country became a militant in and then president of the Front Démocratique pour le Salut de la Somalie (FDSS). The appellant's fear of persecution derives not only from her connection with her brother but also from her own political opinions and the fact she is a Muslim.

3 In the disputed decision the Refugee Division, after summarizing the evidence in outline, said the following:

> [TRANSLATION] After analysing all the evidence, both documentary and testimonial, we conclude that the plaintiff is not a Convention refugee for the following reasons.
>
> Even if there is objectively no doubt as to the existence of her fear regarding the human rights situation in Somalia, we feel that the plaintiff's evidence as a whole intended to establish the subjective nature of her fear is not credible, primarily for four reasons: her manner of testifying, half-truths, contradictions without satisfactory explanations and major improbabilities. [Appeal Book, at pages 80-81.]

4 The Refugee Division then gave examples of passages in the appellant's testimony which, in its opinion, lessened her credibility and concluded:

> [TRANSLATION] For all these reasons, we find it difficult to attach any credence to the plaintiff's testimony. The Refugee Division accordingly finds that the plaintiff is not a Convention refugee as defined in s. 2(1) of the Immigration Act. [Appeal Book, at page 84.]

5 To begin with, the appellant is objecting to this decision on a ground of pure law: as the Refugee Division concluded that "there is objectively no doubt as to the existence of her fear", it simply could not find that the appellant did not have a subjective fear. For my part, I admit that I would find some merit in this challenge if the Division had actually concluded that the subjective fear did not exist while the objective fear was established beyond any doubt. It is true, of course, that the definition of a Convention refugee has always been interpreted as including a subjective and an objective aspect. The value of this dichotomy lies in the fact that a person may often subjectively fear persecution while that fear is not supported by fact, that is, it is objectively groundless. However, the reverse is much more doubtful. I find it hard to see in what circumstances it could be said that a person who, we must not forget, is by definition claiming refugee status could be right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience. The definition of a refugee is certainly not designed to exclude brave or simply stupid persons in favour of those who are more timid or more intelligent. Moreover, I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child or a person suffering from a

mental disability, he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms.

6 In any case, did the Refugee Division really conclude that an objective fear exists? In the circumstances of the case at bar I believe it did not and I feel that, appearances to the contrary, the Division did not make the error it is alleged to have made. It will be recalled that in the passage cited above, the Division clearly said it was persuaded of the objective aspect but at once added an important qualification: "regarding the human rights situation in Somalia". In light of its subsequent observations, and especially the examples it gave in support of its conclusion that the appellant was not credible, I consider that the Division meant that the appellant's fear was not valid even though serious human rights abuses were being committed in Somalia. In other words, the Division did not believe that the appellant had any reason to fear persecution if she returned to her country. From the evidence, this conclusion was based on the fact that the Division considered that the appellant was not a believable witness.

7 The importance of the Division's conclusion regarding the appellant's credibility in the subject decision is thus apparent. The appellant tried to challenge this conclusion directly but with very little success: if the Division erred in refusing to believe the appellant, this is not an error on the basis of which this Court can intervene.

8 However, the appellant made a third challenge to the decision. It concerns the actual behaviour of members of the Division at the hearing. It is in two parts. To begin with, the appellant maintained that members of the Division engaged in a cross-examination that went beyond the permissible limits and that denied the appellant the fair and equitable hearing to which she is entitled. Second, she maintained that one of the members of the Division made comments about her that created an impression of bias. In my opinion, this two-fold challenge is valid.

9 There is no doubt that the members of the Refugee Division have the right to cross-examine the witnesses they hear[1].

10 It appeared that the members in the instant case were fully aware of their right [Appendix, at page 54]:

> [TRANSLATION] BY THE MEMBER (to presiding member)
>
> -- Mr. Chairman, if I might say something, as you know cross-examination is allowed in this tribunal. This is in fact the only way or resource we have to decide on the credibility of certain individuals and goodness knows we hear all kinds of tales.

11 However, there are limits. The transcript of the hearing before the Division is seventy-seven pages long, including the frontispiece. The first eleven pages are taken up

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[1] Mahendran v. Canada (Minister of Employment and Immigration), A-628-90, F.C.A., Heald J.A., judgment dated 21/6/91, not yet reported.

with preliminary matters and the filing of various exhibits. Then, from page 12 to page 22, the appellant answers the questions of her counsel. There are several interruptions by members of the Division, but they are all for the purpose of clarifying the answers given. From page 23 to the end, however, nearly all the questions are asked by members of the Division. It was quite clearly a cross-examination in which the two members took turns. The tone and content of the questions are hardly judicious. The following are some examples, not necessarily the worst [Appendix, at pages 26-27]:

> [TRANSLATION] Q. When you left prison, you went home ... where was that? Was it with your parents or your husband?
>
> A. When I said that I went home, it was to my father and mother's home.
> Q. When did your father die?
> A. In 1977.
> Q. Then how could you have gone to your father's home when he had died in 1989? When you came out of prison ...
> A. But my mother was still there, that did not prevent it being still my father's home.
>
> -- An odd play on words.
>
> A. I'm sorry.
>
> [My emphasis.]

12 The fact of describing the house occupied by her late father and still occupied by his widow as "my father's home" is neither odd nor a play on words.

[Appendix at page 27.]

> [TRANSLATION] Q. You have six brothers?
>
> A. Yes.
> Q. Couldn't you have gone to live near your little brothers in the U.S.?
> A. I chose to come to Canada.
>
> [My emphasis.]

13 It should be noted that at no time was it established that any of the appellant's brothers was younger than her. The adjective "little" was thus purely gratuitous.

[Appendix, at page 34.]

> [TRANSLATION] -- We asked you how you were treated. We did not ask about anybody else, we are talking about you, your

claim is being considered. No one else, madam. You have seventeen years' schooling. You understand our questions. Please tell us at once if you do not understand.

[Appendix, at page 35.]

Q. What clothing did they tear off your back?
A. This type of boubou (phonetic rendering) which I am wearing at the moment.
Q. Of boubou? The long dress?
A. Yes, that's right.
Q. Wasn't it actually your veil? -- because they objected to your wearing a veil. I would have thought it would have been the veil they would have torn first.
A. They cut with scissors, even our veils.

-- Just a moment ago I asked what clothing and you said it was your boubou. Then you went on to say ... because I am giving you ideas ...

A. It was all the clothing I was wearing.
Q. Now you are saying all the clothing? Does this mean you were stripped naked?
A. They cut the sleeves of my dress with scissors.
Q. But not the veil?
A. Yes, even the veil.

[My emphasis.]

[Appendix, at page 51.]

[TRANSLATION] BY THE MEMBER (to the claimant)

-- I am going to put to you a question which you have not yet answered on several occasions. I asked you if you had obtained Kenyan citizenship and you did not answer.

A. No.

BY THE PRESIDING MEMBER (to the claimant)

Q. Do you also have Saudi Arabian citizenship?
A. No.
Q. So, how ... explain to me how the Saudi Arabian government was giving you a grant for a six-year period of study? That is quite costly. The governments ... I can't quite understand how these

governments were so generous to you ...

BY THE MEMBER (to the claimant)

Q. What did you do that was so special for them?
A. Well, I just went to the Molhaq Institute to file my diplomas and an application. So, three months later, I was accepted by the Saudi government and that is also how I was able to obtain my visa.

[My emphasis.]

14 Despite what the member said in the first question, this was the first time that the possibility that the appellant had obtained Kenyan citizenship was mentioned. Further, the documentary evidence confirmed that the Saudi Arabian government offers grants to students in certain African countries (see Appeal Book, at page 73).

[Appendix, at page 56.]

[TRANSLATION] BY THE MEMBER (to the claimant)

Q. You want us to believe that students in Saudi Arabia must leave their country during the holidays. Are you really telling us that? Foreign students must leave during the holidays? Are you really telling us that?
A. When you say all students, it's mostly the girls, female students, who are in Saudi Arabia who cannot remain during the Saudi Arabian holidays.
Q. So now you are telling us that it is girls who cannot remain? Is that what you are also saying?
Q. Yes, it is for the whole year, it is a boarding school, and there are people who look after our health, there are people who handle supplies, but when the school year is over we are taken directly to the airport and sent home. If, for example ... you have a sponsor who is in Saudi Arabia, you can stay. I didn't have one.
Q. Why do they do that? Are they afraid you will go astray during the holidays? What happens?
A. It's ...

-- It's a very long story.

A. It is a Saudi institution, I don't know.

[My emphasis.]

15 Quite apart from the ungracious comments of the member, there is nothing surprising in the witness' statement as such that Saudi Arabia, a Muslim country, requires female foreign students to leave the country during the school holidays.

16 So far the examples given indicate a rather injudicious approach by members of the Division. They ventured to make harassing comments to the witness and put unfair questions to her. Even cross-examining counsel in an adversary proceeding would be barred from going on in this way. It may be that their actions would not by themselves suffice to indicate an appearance of bias in the members of the Division, but they colour another aspect of the case which I must now consider.

17 It will be recalled that the appellant is a woman and was testifying alone in support of her claim to refugee status. The importance of the assessment by the Division members of the appellant's credibility in the final decision will also be recalled.

18 Near the start of his cross-examination of the appellant one of the members had the following exchange with her [Appendix, at pages 33-34]:

> [TRANSLATION] Q. Did they beat you at the first interrogation or at the end?
>
> A. They never touched [me]. They insulted me ...
>
> -- You said a moment ago they slapped you. They touched you, my dear lady.

[My emphasis.]

19 This is an outmoded form of address, clearly sexist and completely unacceptable in the Canada of the present day.

20 A little further on there is the following exchange [Appendix, at page 40]:

> [TRANSLATION] Q. It did not occur to you to go home where you would be safe?
>
> A. You could hear gunshots everywhere, in all parts of the town.
>
> -- All the more reason for you to take shelter somewhere and not to go out with demonstrators.
>
> A. Everybody was there. So I wanted to be with these people who were there to defend their rights.
>
> -- But you were a tiny little woman. You could not make much of a defence.

[My emphasis.]

21 According to her passport filed at the hearing, the appellant is 1.70 metres high and is of normal stature: so why describe her as a "tiny little" woman if not to insult and denigrate her?

22 Finally, right at the end of the hearing, the same member once again spoke to the appellant as follows [Appendix, at page 74]:

> -- As to that, it was translated for you ... the interpreter here is very competent, he translated that same thing to you. He translated this morning. You were given a good twenty minutes if not more. You would have an opportunity again to say so, my dear lady.

[My emphasis.]

23 In my opinion, these sexist, unwarranted and highly irrelevant observations by a member of the Refugee Division are capable of giving the impression that their originator was biased. The day is past when women who dared to penetrate the male sanctum of the courts of justice were all too often met with condescension, a tone of inherent superiority and insulting "compliments". A judge who indulges in that now loses his cloak of impartiality. The decision cannot stand.

24 I would allow the appeal, set aside the subject decision and refer the matter back for a re-hearing before another quorum of the Refugee Division.

MARCEAU J.:— I concur.

MacGUIGAN J.:— I concur.