Federal Court  Cour fédérale

Date: 20150519

Docket: IMM-2811-14

Citation: 2015 FC 643

Ottawa, Ontario, May 19, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

DEEQ MUNYE ABDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [Board], dated March 18, 2014, which allowed the Minister's application pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] to vacate a prior decision made in 2005 which had granted the applicant refugee status.

[2] For the reasons that follow, the application is dismissed.

Background

[3] The applicant is a citizen of Somalia. He arrived in Canada on September 9, 2004, and claimed refugee protection based on his nationality, membership in the Tunni clan and allegations that his land had been taken over by the militia who were seeking to "eliminate" him. The decision granting the applicant refugee protection was based on an expedited interview by a Refugee Protection Officer [RPO] resulting in an expedited report, dated March 4, 2005. The report noted that:

> The claimant is a 34-year old Somali man belonging to the Tunni clan. His father was killed while trying to escape Somalia in 1991. The claimant was able to flee but returned to Somalia in 2001 to discover that the family's farm had been taken over by a militia leader. The claimant appealed to the self proclaimed governor of the area for assistance but was denied. The claimant fled Somalia for the second time when he learned that the militiamen occupying his family land wished to eliminate him.

[4] The report noted that the applicant had an identity witness, who was a friend of his father, and who the applicant met at a mosque in Toronto.

[5] The report also noted that the applicant was knowledgeable about the Tunni clan. The RPO stated: "I have no reason to doubt the claimant's personal, ethnic, tribal, religious or national identity." Finally, the report stated that the documentary evidence suggests that the Tunni are a vulnerable, minority clan in Somalia, that the claimant would be in danger if he were to return and that this danger is "compounded by the fact that the claimant tried to regain his

family land from a militiaman who was occupying it, and that has led to a threat to the claimant's life which is specific to him and additional to the mere fact that he is Tunni."

[6] In 2005 the Board accepted the applicant's claim noting that he "was found by a perceptive RPO to be believable. His evidence is corroborated by one witness. His tribe is of a minority which lives in some danger."

[7] Based on new information revealed by finger print analysis, the Minister sought to vacate the applicant's refugee status. The new information included that the applicant had entered the United States [U.S.] in 1996 and resided there until 2004 and, as a result, was not in Somalia at the time of the alleged threat to him and his land; the applicant had several aliases in the U.S.; and, the applicant had an extensive criminal record in the U.S.

The 2014 Decision of the Board

[8] The Board found that the applicant's positive refugee decision was obtained as the result of his misrepresentation and withholding of material facts relating to a relevant matter and that there was no other sufficient evidence that was considered by the Board in 2005 to justify the applicant's refugee status.

[9] The Board noted that the applicant admitted the misrepresentations but argued that the misrepresentations were not material and that the evidence of the identity witness was sufficient to justify refugee protection based on his nationality and ethnicity, which are facts not affected by his misrepresentations.

[10] The Board disagreed and found that the applicant's misrepresentation about his whereabouts between July 1996 and 2004 was indeed material and relevant. The Board noted that the 2005 Board decision did not indicate that the allegation of past persecution in Somalia was not germane and it should have been regarded as relevant to the positive refugee determination.

[11] The Board found that the claim was accepted in 2005 because the Board had found that the applicant was a credible witness with respect to *all* the facts alleged, including his Tunni ethnicity and his alleged persecution. If the Board had known that the applicant was not even in Somalia in 2001, the Board would have found that the applicant was not credible.

[12] The Board also found that the testimony of the identity witness only established that the applicant is Somalian, not that he is a member of the Tunni tribe, noting:

> [T]here is nothing in the text of the expedited report before me as to what evidence was provided by AH [the identity witness] at the expedited interview to verify that AH provided any testimony at all to the RPD about the respondent's [now the applicant] ethnicity. The expedited report only says that AH testified and that he knew the respondent's father and that AH's testimony was consistent with information provided by the respondent.

[13] The Board attributed no weight to the applicant's own testimony at the 2014 hearing where he indicated that the identity witness had testified at the expedited hearing in 2005 that the applicant is Tunni.

[14] The Board found that the applicant was not a credible witness with respect to his ethnicity, noting that he did not claim to be Tunni in his U.S. asylum claim or with U.S.

authorities, despite that in his Canadian claim for protection, he alleged his ethnicity to be one of the most important reasons for his fear of returning to Somalia.

The Standard of Review

[15] The issues in the present case are questions of mixed fact and law. The reasonableness standard applies; the issue is whether the Board's decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (Dunsmuir, at para 47). There might be more than one reasonable outcome. However, as 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" (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339).

[16] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16, [2011] 3 SCR 708, the Supreme Court of Canada elaborated on the requirements of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, noting that reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" and that courts may "look to the record for the purpose of assessing the reasonableness of the outcome".

[17] It is also well-established that boards and tribunals are ideally placed to assess the credibility of refugee claimants (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at para 4, 160 NR 315 (FCA)) and, given its role as trier of fact, the Board's credibility findings should be given significant deference (*Lin v Canada (Minister of Citizenship*

and Immigration), 2008 FC 1052 at para 13, [2008] FCJ No 1329; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 65, 415 FTR 82).

Relevant statutory provision

Section 109 of the Act provides:

109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	109. (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

The Issues

[18] This application for judicial review raises two related issues:

- Whether the Board erred in determining that the 2005 decision granting the applicant refugee protection was obtained as a result of a misrepresentation of a material fact relating to a relevant matter?

- Whether the Board erred in determining that there was no other sufficient evidence to justify refugee protection pursuant to ss 109(2) despite the misrepresentation?

The Applicant's position

[19] The applicant argues that his misrepresentations are not material or relevant because he is a Tunni from Somalia and, on this basis alone, his refugee status would or should have been granted in 2005. The applicant submits that an identity witness confirmed that he is from Somalia and is a Tunni. Therefore, the fact that he was not in Somalia at the time of the events he claimed, i.e., the threat from the militiaman who had taken over his family's farm, is of no consequence.

[20] The applicant argues that the Board erred in speculating about what the previous Board would have concluded in 2005 if there had been no misrepresentation. The Board in 2014 was required to consider the evidence that was available in 2005 and then determine whether that evidence would have been sufficient to justify refugee protection. The applicant submits that the Board failed to do so and that the evidence in 2005 would have justified refugee protection.

[21] The applicant claims that it was unreasonable for the Board in 2014 to assume what would have been relevant to the 2005 Board based on the RPO's report and to rely on the fact that in 2005 the Board did *not* indicate that the allegation of persecution was not germane. The applicant submits that documentary evidence should be considered for what it does say, rather than what it does not say (*Bagri v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ

No 784, 168 FTR 283; *Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 729, 167 FTR 309; and, *Njeru v Canada*, 2009 FC 1281, [2009] FCJ No 1641).

[22] The applicant argues that even though he spent years in the U.S., including the time period he alleged persecution in Somalia, and had a criminal history in the U.S., this would not necessarily have resulted in inadmissibility to Canada. His claim for refugee protection based on the persecution of Tunni in Somalia would have still been considered, albeit not in an expedited manner.

[23] The applicant also argues that the Board erred in assessing his credibility based on his past misrepresentations. He admitted that he made misrepresentations in the past, but this should not have tainted his testimony at the 2014 hearing. Moreover, even where an applicant is not credible, the Board must consider the documentary evidence (*Baranyi v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 664, [2001] FCJ No 987 [*Baranyi*]; *Voytik v MCI*, 2004 FC 66, [2004] FCJ No 50).

[24] The applicant submits that the objective documentary evidence establishes that he is a person in need of protection under sections 96 and 97, even if he is not credible. The test for protection pursuant to section 97 is objective, based on the applicant's profile and the documentary evidence before the Board (*Maimba v Canada (Citizenship and Immigration)*, 2008 FC 226, [2008] FCJ No 296 [*Maimba*]; *Fixgera Lappen v Canada (Citizenship and Immigration)*, 2008 FC 434, [2008] FCJ No 566 [*Lappen*]; *Rathinasigngam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 988, [2006] FCJ No 1247; and, *Kule v Canada*

(Minister of Citizenship and Immigration), 2006 FC 770, [2006] FCJ No 996). The applicant reiterates that he is a Tunni from Somalia and that the country conditions in 2005 would have led to the finding that he was in need of protection.

[25] The applicant submits that his testimony indicated what the identity witness had said in 2005 and this should have been considered along with the report of the RPO which indicated that the identity witness confirmed he is from Somalia and a Tunni.

The Respondent's Position

[26] The respondent submits that Board carefully considered the evidence before it, including the report of the RPO in 2005 which indicates that the threat from the militiaman was an integral part of the applicant's claim. The claim was not based solely on his nationality or his ethnicity.

[27] The applicant's Personal Information Form [PIF], submitted in 2004, which set out his claim and reason for refugee protection, is part of the record and demonstrates that the applicant did not disclose that he was ever in the U.S. The PIF recounts the applicant's claim that he left Somalia in 1991 and later returned to Somalia in 2001, but fled due to the occupation of his family farm and the threats to his life from the militiaman in 2003 and 2004.

[28] The respondent notes that due to the untruthfulness of this information, it is not known when the applicant actually left Somalia. However, he was clearly not in Somalia at the time of the alleged threat.

[29] The respondent submits that the Board reasonably found that the applicant misrepresented or withheld material facts relevant at the time his refugee claim was made. The Board made reasonable inferences of fact. The applicant is merely challenging how the Board weighed the evidence.

[30] The respondent submits that the 2005 decision reveals that the applicant was found by the RPO to be believable. It was reasonable for the Board to infer that the 2005 decision referred to the believability of all of the facts the applicant had claimed, including the allegation of persecution and threats to his life.

[31] The Board did not speculate, rather it made the appropriate inferences regarding whether the claim for refugee protection would have been successful if there had been no misrepresentations. The respondent points out that what is now known is that the applicant left Somalia at some time before 1996, although it is not known how long before, and lived in the U.S. for at least eight years before arriving in Canada. The applicant was not in Somalia at the time of the alleged persecution that caused him to leave. The respondent submits that being Tunni, even if that were established, and Somalian is not sufficient on its own to justify refugee protection.

[32] The Board also noted that the identity witness in 2005 did not confirm that the applicant was Tunni. The identity witness only referred to knowing the applicant's father in Somalia. The 2005 report notes only that the applicant was knowledgeable about the Tunni clan.

[33] In addition, the Board's negative credibility inferences regarding the applicant's ethnicity were reasonably based on the discrepancy between his Canadian refugee claim and his U.S. asylum claim.

[34] The respondent submits that there must be more than country condition evidence to establish persecution (*Canada (Minister of Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181, [2008] FCJ No 234 [*Gunasingam*]; *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153, [2002] 4 FC 501; *Ray v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 849, 191 FTR 316; and, *Arumugam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1449, [2005] FCJ No 1773). In this case, there is no evidence to link the applicant to possible persecution in Somalia in 2005.

[35] The respondent adds that *Maimba* and *Lappen* are distinguishable because, in those cases, the identity of the claimant was not in dispute. In the present case, the Board did not accept that the applicant was a member of the Tunni tribe, which was fundamental to his claim for refugee protection.

The Board reasonably found that the 2005 decision granting the applicant refugee protection was obtained as a result of a misrepresentation of a material fact related to a relevant matter

[36] The approach to an application to vacate a decision granting refugee status involves two steps: first, the Board must find that the decision granting refugee protection was obtained as a result of a direct or indirect misrepresentation, or of withholding material facts relating to a relevant matter; second, the Board should consider whether there remains sufficient evidence that was considered at the time of the positive determination to justify refugee protection and, if

so, the Board *may* reject the application to vacate (i.e. confirm the refugee status), notwithstanding the misrepresentation.

[37] In the present case, the applicant admitted that he misrepresented facts and withheld that he was in the U.S. from 1996-2004. He argues, however, that his misrepresentations are not material or relevant because the basis for his claim for refugee protection is that he is Somalian and of Tunni ethnicity and these facts are unchanged by his misrepresentation and constitute sufficient evidence to justify his refugee protection.

[38] I do not accept the applicant's submission that his misrepresentations regarding his eight or more years spent in the U.S., his aliases, or his criminal history are not material facts related to a relevant matter and that all that is relevant is that he is a Tunni from Somalia. The applicant's refugee claim was based on allegations that are now known to be untrue. It is not possible to reconstruct any credible history given that the applicant was not in Somalia at the time of the alleged threats to his life regarding the occupation of his land, an allegation that was clearly part of his claim for refugee protection.

[39] The Board did not merely speculate about what would have been decided in 2005. The Board reviewed the evidence available in 2005 and reasonably found that the applicant had established he was from Somalia, which was corroborated by an identity witness. However, the 2005 report does not state that the same identity witness confirmed that the applicant is a Tunni. Nor does the applicant's own evidence at the 2014 hearing indicate that the identity witness

stated he is a Tunni; the applicant's testimony was vague and evasive. Moreover, the applicant did not respond to questions about his current knowledge of the Tunni clan.

[40] The Board made reasonable inferences about the likely outcome in 2005 if the facts had been known based on the principles of refugee protection. As noted by the respondent, the applicant's nationality and membership in the Tunni clan, if that is true, is insufficient to justify refugee protection.

[41] Even the RPO report which the Board relied on in 2005 linked the applicant's claim to the specific threat he alleged, noting that the applicant's danger upon return was "compounded by the fact that the claimant tried to regain his family land from a militia man who was occupying it, and that has led to a threat to the claimant's life, which is specific to him and additional to the mere fact that he is Tunni."

[42] As noted by Justice Harrington in *Gunasingam* at para 18:

> Whether considered under subsections 109(1) or 109(2), the member was wrong in concluding that country conditions alone justified the granting of refugee status. The claim must be personalized (*Taj v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 707, [2004] F.C.J. No. 880, *Canada (Minister of Citizenship and Immigration) v. Fouodji*, 2005 FC 1327, [2005] F.C.J. No. 1614 and *Coomaraswamy*, above.

[43] The personal aspect was the applicant's claim that he was persecuted, specifically his allegation of the threats made to him by militiamen who occupied his land. Since he was not

even in Somalia at the time of this alleged threat, the personal aspect was completely eroded. This misrepresentation was clearly a material fact related to a relevant matter.

The Board reasonably found that there was no other sufficient evidence to justify refugee protection pursuant to ss 109(2) despite the applicant's misrepresentation

[44] Subsection 109(2) permits the Board to reject the application to vacate if the Board is satisfied that other sufficient evidence was considered to justify the earlier refugee determination. The Board has discretion; it is not required to reject the application to vacate even if it is satisfied that there was other evidence to justify refugee protection. However, in the present case, the Board was not satisfied that there was any such evidence.

[45] The evidence available in 2005 was limited to the report of the RPO and Board's brief endorsement of that report. The applicant's evidence in 2014 regarding his 2005 interview and the testimony of his identity witness was evasive and reasonably found not to be credible.

[46] The Board acknowledged the applicant's explanation that he did not disclose his Tunni ethnicity in his U.S. asylum application because he did not understand U.S. procedures, but found that explanation to be unreasonable. The Board's finding that the applicant's evidence regarding his ethnicity was not credible was reasonably based on the inconsistencies between his Canadian and U.S. asylum claims.

[47] In addition, the Board probed the applicant at the 2014 hearing regarding the evidence provided in 2005, which revealed that the applicant was evasive in response to whether the identity witness confirmed he is a Tunni or how the identity witness would know if he were

Tunni. The applicant was also evasive about whether he was questioned about his knowledge of the Tunni clan.

[48] The applicant's argument that he is Somalian and Tunni and that this is sufficient to support his refugee claim because the country condition evidence would have supported the risk he faced, cannot succeed, as noted above (*Gunasingam* at para 18).

[49] In *Gabor v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1162 at para 14, [2010] FCJ No 1446, Justice Zinn rejected a similar argument. In that case, an applicant who was Roma asserted that once the Board accepted that he was Roma, the Board was obligated to canvass objective country condition materials despite the negative credibility finding. Justice Zinn noted at para 15:

> The applicant's submission must fail in light of the decision of the Federal Court of Appeal in *Sellan v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, wherein, in answering a certified question, the Court stated:
>
> > [W]here the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[50] The applicant also relied on *Baranyi* for the proposition that, even where an applicant is not credible, the Board must consider the documentary evidence. However, as Justice O'Keefe noted in *Baranyi* at para 14, citing *Seevaratnam v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 694, 167 FTR 130:

> [W]here the only evidence linking the claimant to the persecution emanates from his or her testimony, rejecting the testimony means there is no longer a link to the persecution. It becomes impossible to establish a link between the person's claim and the documentary evidence.

[51] In the present case, the Board reasonably found that the applicant lacked credibility with respect to his ethnicity. Given that his allegation of persecution was found to be a misrepresentation, there was no link between his claim and the documentary evidence and there was simply no other credible evidence on the record to support his claim for refugee protection.

[52] As Justice Harrington noted at the conclusion of his decision in *Gunasingam* at para 24: "It is simply wrong to think one can gain entry to Canada on the strength of a lie."

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No question is proposed for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Alal Kikinova	FOR THE APPLICANT
A. Leena Jaakkimainen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Loebach Law Office Barrister and Solicitor London, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT