Federal Court  Cour fédérale

Date: 20160722

Docket: IMM-4340-15

Citation: 2016 FC 860

Ottawa, Ontario, July 22, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

YUSSUF ABDIKADIR YUSSUF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [the Act] of a September 4, 2015 decision by the Refugee Appeal Division [the RAD] of the Immigration and Refugee Board [the IRB]. In that decision, the RAD confirmed a decision of the Refugee Protection Division [the RPD] of the IRB finding that the Applicant is not a Convention refugee or a person in need of protection under the Act. For the reasons explained below, this application is denied.

II. Facts

[2] The Applicant is a citizen of Somalia. He alleged, before the RPD, that he was born in Mogadishu. He also alleged that he was a member of the Majerteen clan, a subset of the Darod clan dominant in northern Somalia.

[3] In Mogadishu, the Hawiye clan is dominant. The Applicant alleges that he faced persecution from the Hawiye and from Al-Shabaab, a radical Islamic militant group. In 1995, he, his wife, and their children fled to Kenya. The Applicant managed to leave Kenya and travel to the United States, where he made a refugee claim. When that claim was rejected, he traveled to Canada and made another.

[4] The Applicant fears that if he is returned to Somalia he faces persecution at the hands of the Hawiye clan and Al-Shabaab.

[5] The RPD heard the Applicant's claim on September 30, 2013. The RPD found, in a January 20, 2014 decision, that the Applicant had an Internal Flight Alternative [IFA] in Bosaso. Bosaso is a city in Puntland, an autonomous region within the north of Somalia with a largely Majerteen administration.

[6] Before the RAD, the Applicant argued that Bosaso was not a viable IFA because he was born in southern Somalia and as such he would not be accepted in the north. On May 30, 2014, the RAD dismissed this appeal.

[7] The Applicant then sought judicial review and, on May 26, 2015, in an unpublished decision (*Yussuf v Canada (Minister of Citizenship and Immigration*) IMM-5042-14), Justice Hughes returned the matter to the RAD for redetermination, on the basis of unreasonable aspects of the IFA finding. Specifically, in returning the matter for redetermination, Justice Hughes framed the issue as "whether a person born and raised in Mogadishu, even if that person is of the majority clan in Bosaso, can safely live and carry on his life in Bosaso or whether his 'southernness' will condemn him as an outsider, regardless as to clan affiliation".

[8] The ensuing RAD redetermination focused exclusively on this question and is the subject of this judicial review.

III. Decision

[9] The RAD first stated that, per Justice Phelan's directions in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*], it would come to its own independent assessment of the Applicant's claim, deferring to the RPD only on issues of credibility or where the RPD has a similar advantage in reaching its conclusions (Applicant's Record at 9 [AR]).

[10] The RAD then outlined the test for determining an IFA, which comes from *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at 710 (FCA), stating that:

> 1) the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists and/or the claimant would not be personally subject to a risk to life or a risk of cruel and unusual treatment or punishment or a danger, believed on substantial grounds to exist, of torture in the IFA.

> 2) moreover, the conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claim, for him to seek refuge there. (AR at 9-10)

[11] The RAD noted that the Applicant argued that he would either not be accepted in Bosaso or be deported from Bosaso if he attempted to seek refuge there.

[12] The RAD then turned to the documentary evidence, finding that while authorities in Puntland had deported Somalis who had come from the south, there was no evidence that these deportees included members of the Darod clan. The RAD further noted that while some of the internally displaced persons within Puntland were members of the Darod clan, they had access to protection under *xeer*, a customary legal system based on clan membership.

[13] The Applicant also argued that he would not even be able to resettle in Puntland because, according to the documentary evidence, Puntland only permits individuals who are both members of a local clan *and* former residents to resettle. For support, the Applicant cited a passage from the RPD's National Documentation Package [the NDP] on Somalia, stating that "Somaliland and Puntland in general only accept back persons who were former residents of those regions and were members of locally based clans or sub clans" (AR at 12).

[14] The RAD, however, noted two further passages from the NDP:

> …whether an internal flight alternative exists in Puntland or Somaliland will depend on the circumstances of the individual case, including whether the individual is a member of a majority or minority clan and whether the individual originates from the territory to which they are seeking to relocate.

…

> …authorities in Somaliland will only admit failed asylum seekers returning from European countries who originate from their territory or those who have close affiliation to the territory through clan membership. (AR at 12-13)

[15] In light of these passages, the RAD concluded that it was not mandatory that both criteria be present for an individual to resettle in Puntland but that both were criteria that could be considered.

[16] The Applicant also submitted to the RAD that he had heard both in the news and from fellow refugees in Kenya that some Majerteen clan members were removed from Puntland because they had southern accents, and that, as a non-native of Puntland, he could easily be mistaken for an economic migrant or a southern Al-Shabaab infiltrator. The RAD gave little weight to this testimony, however, because it was uncorroborated by the "copious amounts of documents… from highly reputable sources which address the situation of Internally Displaced Persons (IDPs) and the removal of individuals from Puntland by authorities" (AR at 13).

[17] As for the Applicant's fears of persecution by the Hawiye clan and Al-Shabaab, the RAD concluded that Bosaso was a safe location. The documentary evidence suggests that both the Hawiye clan and Al-Shabaab are located in south and central Somalia and have no authority or control within Puntland, and while the RAD acknowledged that there are reports of violence by Al-Shabaab in Puntland, the Applicant does not fit the profile of those targeted, namely businessmen, elders, law enforcement, or religious leaders.

[18] The Applicant further argued before the RAD that he would be at risk in the Internally Displaced Person [IDP] settlements in Puntland. He contended that many IDPs are Darods and, while given some protection under *xeer*, faced deplorable conditions in the IDP settlements – conditions that affected all IDPs, regardless of clan.

[19] The RAD was not persuaded, however, finding that the documentary evidence stated that IDPs were at risk of human rights violations "in the absence of clan protection and support". The settlements might not be ideal, but the Applicant had not demonstrated on a balance of probabilities that he would face persecution were he to, as the RAD put it, "return to Puntland" (AR at 17).

[20] Finally, the Applicant asserted that, without family or a support network in Puntland, it would be impossible to establish himself there. The RAD acknowledged this challenge but stressed that the hardship associated with relocation is not the kind of hardship that renders an IFA unreasonable in all circumstances. The RAD also pointed to documentary evidence stressing the relative stability of northern Somalia and the fact that the Applicant belongs to the dominant clan in Puntland.

[21] The RAD concluded that the Applicant had not demonstrated that he would face a serious possibility of persecution if he was to relocate to Puntland and that the IFA in Bosaso was reasonable. The RAD thus dismissed the appeal and confirmed the RPD's decision.

IV. Standard of Review

[22] As mentioned above, the RAD decided, per *Huruglica*, to conduct its own assessment of the evidence before the RPD. Neither party raised this decision (on standard of review) as an issue prior to or at the hearing. Indeed, counsel for both parties followed up with the Court regarding the post-hearing release of the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93. The parties agreed again that the RAD's selection of a standard of review raised no issues in light of the Federal Court of Appeal's decision, and I am in accordance with that assessment.

[23] As such, the Applicant's objections relate purely to the substance of the RAD's assessment: specifically, the RAD's assessment of the facts and their application to the law in determining whether an IFA exists.

[24] When reviewing the RAD's assessment of the availability of an IFA, a reasonableness standard applies (*Pidhorna v Canada (Citizenship and Immigration)*, 2016 FC 1 at para 20; *Kurtzmalaj v Canada (Citizenship and Immigration)*, 2014 FC 1072 at para 18). This Court must therefore take a deferential approach and assess whether the decision is an acceptable and rational solution that is justifiable, transparent and intelligible (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

[25] The Applicant alleges that the RAD made numerous mistakes in its IFA analysis. None of them, however, rise to the level of a reviewable error.

[26] First, the Applicant argues that it was a "significant misunderstanding" on the part of the RAD to state that the Applicant could "return" to Puntland when he had never lived there (AR at 85). As the Respondent correctly notes, however, the RAD's analysis throughout was premised on the fact that the Applicant was born in and lived in southern Somalia exclusively. As a result, the error was not material, and in any event, the RAD's use of the word "return" could have simply referred to the prospect of a "return" to Somalia more generally.

[27] Second, the Applicant argues that the RAD failed to address how "realistically attainable" the IFA is, considering the documentary evidence was clear that movement within Somalia is heavily limited by armed forces, such as Al-Shabaab and others, who pose a danger to the Applicant. Here the Applicant points to *Tahlil v Canada (Citizenship and Immigration)*, 2011 FC 817, where Justice Zinn took issue with an RPD finding that a Somali citizen and member of the Majerteen clan could fly to Puntland safely from Mogadishu.

[28] The problem for the Applicant with *Tahlil*, however, is that Justice Zinn ultimately upheld the RPD's decision, noting that a Dubai-based airline flies international flights into Bosaso and that this made it a reasonable IFA.

[29] The same logic applies here: so long as the Applicant can travel to Bosaso without travelling to Mogadishu first, the IFA is realistically attainable and on that basis, I find the RAD's conclusion to be reasonable.

[30] Third, the Applicant argues that it is clear that only former residents are allowed to re-settle in Puntland, pointing to a UNHCR document in the NDP:

> With regard to asylum-seekers originating from the northern part of Galkayo (in Puntland) the 2010 Somalia Eligibility Guidelines recommend that the States exercise caution when considering the return of persons originating from Puntland or Somaliland who are not found to be in need of international protection. Puntland and Somaliland will not accept the return of Somalis unable to establish that they originate from those territories. Therefore, individuals claiming to be from Puntland or Somaliland who are unable to establish that they originate from these territories should not be returned there.
>
> …
>
> There are a number of factors which, taken in combination, indicate that an IFA/IRA is generally not available for individuals from southern and central Somalia in Puntland and Somaliland. These include not only the generally deplorable living conditions of displaced persons in these territories, but perhaps most importantly the fact that Puntland and Somaliland will not accept the return of Somalis unable to establish that they originate from those territories. (AR at 85)

[31] The Applicant further argues that this information came from a report that was never directly referenced in the RAD decision, even though it was part of the NDP. This kind of selective referencing, the Applicant submits, is a reviewable error when it leaves contrary evidence unaddressed (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425).

[32] What the Applicant neglects, however, is that this document is titled "Addendum to 2010 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia, relating specifically to the city of Galkacyo" (emphasis added). This addendum does not even mention Bosaso. Furthermore, the passage quoted by the RAD in its decision actually directly addresses the 2010 UNHCR Eligibility Guidelines, stating that:

> In its May 2010 Eligibility Guidelines, UNHCR considered that the generally deplorable conditions of displaced persons in Puntland and Somaliland indicates that internal relocation was generally not available for individuals from southern and central Somalia. However, it also stated that whether an internal flight alternative exists in Puntland or Somaliland will depend on the circumstances of the individual case, including whether the individual is a member of a majority or minority clan and whether the individual originates from the territory to which they are seeking to relocate. (Certified Tribunal Record at 39)

[33] The RAD, then, relied on more recent evidence that stressed the need for an individualized assessment and did not leave current contrary information out of its analysis. The RAD's analysis indeed included an individualized assessment. The fact that another decision-maker may not have agreed with the assessment, or may have arrived at a different conclusion, does not mean that the RAD member came to an unreasonable decision.

[34] Fourth, the Applicant argues that the RAD erred in concluding that the *xeer* system could offer sufficient protection from persecution. It is not a law enforcement agency and Puntland, as a sub-national entity, has no international obligations to protect the Applicant. In other words, there is no state protection available to the Applicant and *xeer* does not meet the requisite standards of state protection. The Applicant further contends that the RAD also ignored the Applicant's submission that *xeer* does not apply to individuals from the South.

[35] This argument is not persuasive. The RAD never concluded that the *xeer* system was a sufficient replacement for state-level protection. Rather, it simply found that the *xeer* system was a relevant factor in assessing the conditions that the Applicant would face in Bosaso.

[36] Finally, the Applicant argues that the RAD erred in concluding that the IFA was reasonable in all circumstances, citing *Omar v Canada (Minister of Citizenship and Immigration)*, 2015 FC 637 at para 10:

> There are several recent Federal Court cases that call into question the reasonableness of an IFA where a person: comes from a minority clan or cannot establish clan membership, and would be conspicuous thereby; has never lived at the IFA nor have family there; does not speak the language; has not lived in Somalia for years and has no adult experience there; has no prospects for residence or employment and has lived for 10 years in North America (see *Abdulla Farah v Canada (Citizenship and Immigration)*, 2012 FC 1149, 223 ACWS (3d) 183; *Abubakar v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 887, 67 FTR 313; *Yahya*, supra). The Officer largely ignores these factors.

[37] These are, of course, not binding pronouncements, but indicia of an unreasonable IFA, most of which do not even apply to this matter. Furthermore, the case law is clear that the threshold for unreasonableness for an IFA finding is high, requiring the Applicant to provide "actual and concrete evidence" of conditions in the IFA that "would jeopardize… life and safety… in travelling or temporarily relocating" to that area (*Ranganathan v Canada (Minister of Citizenship & Immigration)*, [2001] 2 FCR 164 at para 15 (FCA)).

[38] When the Applicant argues, for example, that the conditions in resettlement camps are deplorable and thus it is not reasonable to require him to relocate there, the Applicant overlooks the RAD's finding that "[t]he documentary evidence relied upon by the Appellant does not support his assertion that members of the majority clan face deprivation of human rights" in resettlement camps. This objection, like many others raised by the Applicant, amounts to a request for this Court to reweigh the evidence, which is something this Court cannot do under a

reasonableness review. Nor is it the role of this Court to substitute the conclusion that it or another RAD member, might have reasonably come to when confronted with the same facts.

[39] Justice Hughes sent this matter for redetermination once before, instructing the RAD to consider whether the Applicant could safely live and carry on his life in Bosaso, or whether his "southernness" would condemn him. The RAD heeded these directions and examined this question in light of the evidence before it. I cannot say that it did so in a manner lacking in intelligibility, transparency, or justification or that its conclusion did not fall within the range of acceptable outcomes.

VI. Conclusion

[40] Despite the concerted efforts of Applicant's counsel, and not for want of turning over every stone in this decision, this application for judicial review is denied. No questions are certified and no costs are ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. There is no order as to costs;

3. There is no question for certification.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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