

Federal Court



Cour fédérale

Date: 20160920

Docket: IMM-5305-15

Citation: 2016 FC 1067

Ottawa, Ontario, September 20, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MUKHTAR ABDULLA HASSAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mukhtar Abdulla Hassan, claims to be a citizen of Somalia and that he belongs to the minority Reer aw Hassan clan. He alleges risk due to minority clan status and that he fears returning to Somalia because of the Habar Gidir clan, the Al Shabaab militia and his father-in-law who objected to someone of Mr. Hassan's clan affiliation marrying his daughter.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada determined that Mr. Hassan is not a Convention refugee or a person in need of protection under section 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Mr. Hassan appealed this determination to the Refugee Appeal Division [RAD], which dismissed the appeal. This result was set aside by consent on a previous judicial review, and the RAD re-determined the appeal, again confirming the decision of the RPD. Mr. Hassan now seeks judicial review of this redetermination.

[3] As explained in greater detail below, this application is dismissed, because Mr. Hassan has not demonstrated reviewable errors on the part of the RAD.

II. Background

[4] Mr. Hassan alleges that he fled Somalia in 2006 and traveled to Kenya and subsequently to South Africa that same year, where he lived for a period of over 5 years. He claims that in 2010 he married a Somali woman from the Abgal clan but that his wife's father objected strenuously to the marriage and threatened to kill Mr. Hassan and his parents and siblings. Mr. Hassan alleges that his wife was murdered in 2012 by a mob of anti-Somali South Africans. He then traveled to the US where he made an unsuccessful refugee claim, following which he came to Canada and again sought refugee status.

[5] In rejecting Mr. Hassan's claim, the RPD noted that he failed to provide identity documentation. It accepted on a balance of probabilities that he was a citizen of Somalia, based on the testimony of an identity witness, but did not accept his alleged minority clan status. Based

on inconsistencies in his evidence, the RPD found that Mr. Hassan was not credible. It also drew an adverse inference as to his subjective fear, because he did not pursue permanent protection during his alleged stay of over 5 years in South Africa.

[6] In the re-determination of the appeal from the RPD, the RAD identified that it would follow guidance on the applicable standard of review provided by the decision of Justice Phelan in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*]. The RAD stated that it would come to an independent assessment of whether Mr. Hassan is a Convention refugee or person in need of protection, while affording deference to the credibility findings of the RPD.

[7] The RAD denied the appeal, finding based on the totality of the evidence that Mr. Hassan had not established that there is a serious possibility that he would be persecuted in Somalia or that, on a balance of probabilities, he would be personally subjected to a danger of torture, or face a risk to life, or to a risk of cruel and unusual treatment or punishment in Somalia. The RAD's reasons will be canvassed in more detail below in the Court's consideration of Mr. Hassan's arguments.

III. Issues

[8] Mr. Hassan's argument before the Court focused on the following issues:

- A. Did the RAD err in its application of the standard of review, or breach procedural fairness, in rejecting the identity witness' evidence of Mr. Hassan's clan affiliation?

- B. Did the RAD treat unreasonably a letter from the Somali Immigrant Aid Organization in support of Mr. Hassan's clan affiliation?
- C. Did the RAD treat unreasonably a Response to Information Request in the National Documentation Package for Somalia?

IV. Analysis

- A. *Did the RAD err in its application of the standard of review, or breach procedural fairness, in rejecting the identity witness' evidence of Mr. Hassan's clan affiliation?*

[9] Mr. Hassan does not take issue with the standard of review articulated by the RAD based on *Huruglica*, but he submits that the RAD erred in its application of that standard to the identity witness' evidence of Mr. Hassan's clan affiliation. He argues that the RPD found the witness to be credible and that the RAD should therefore have deferred to that credibility finding. Mr. Hassan points out that the identity witness confirmed his claimed clan affiliation and submits that this clan affiliation should therefore have been accepted. Instead, the RAD analysed itself the witness' evidence and found that little weight could be attributed to his testimony in establishing Mr. Hassan's clan affiliation and allegations.

[10] I find no error on the part of the RAD in how it approached the identity witness' evidence. The RAD proceeded with its own analysis of the witness' evidence, because it found that the RPD did not make any findings with respect to the witness' general credibility. The RAD found that, although the RPD accepted that the witness provided reliable evidence of Mr.

Hassan's identity as a national of Somalia, the RPD did not accept the witness' evidence as to Mr. Hassan's clan affiliation. I consider Mr. Hassan's argument, surrounding the RAD's application of the standard of review, itself to be reviewable on a standard of reasonableness. However, as I read the RPD's decision, the RAD's interpretation of the RPD's decision, and the RAD's resulting approach to the identity witness' evidence, are both reasonable and correct. The RPD accepted, on a balance of probabilities, that Mr. Hassan is a citizen of Somalia, based on the testimony of the identity witness, but reached no conclusions as to the witness' general credibility or with respect to the credibility of his evidence on Mr. Hassan's clan affiliation. The RPD's decision recites aspects of the witness' evidence but, other than the evidence on Mr. Hassan's national identity, does not make favourable credibility findings on the witness' evidence. The RAD therefore analysed the witness' evidence itself and was properly applying the applicable standard of review in doing so.

[11] Mr. Hassan also argues that the RAD erred in undertaking this analysis of the identity witness' evidence, because this issue was not raised in his appeal to the RAD. He submits that the RAD was without jurisdiction to consider this issue and that it was a breach of procedural fairness for the RAD to have considered this issue without giving him notice of its intention to do so.

[12] In support of this argument, Mr. Hassan relies upon the decision of the Supreme Court of Canada in *R. v Mian*, 2014 SCC 54 [*Mian*], which addressed the scope of an appellate court's jurisdiction to raise new issues and the procedures to be followed when such jurisdiction is exercised. Although *Mian* was a criminal case, it has been a considered by this Court in the

context of RAD decisions. In *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725 [*Ching*], at paragraph 67, Justice Kane considered the conclusion of the Supreme Court in *Mian* that, although an appellate court has jurisdiction to raise a new issue, this would be rare and only when failing to do so would risk an injustice. The appellate court should also consider whether there is a sufficient record on which to raise the issue and whether raising the issue would result in procedural prejudice to any party.

[13] Justice Kane concluded at paragraph 74 that, whether or not the principles in *Mian* should be applied by the RAD, it is a basic principle of natural justice and procedural fairness that a party should have an opportunity to respond to new issues and concerns that will have a bearing on a decision affecting them. Similar principles were applied by Justice Annis in *Ojarikre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 896, in reliance on both *Mian* and *Ching*.

[14] The difficulty with Mr. Hassan's reliance on these authorities is the fact that, in addressing the identity witness' evidence of Mr. Hassan's clan, the RAD has not embarked upon a new issue, meaning an issue that cannot reasonably be said to stem from the issues as framed by the parties (see *Ching*, at para 67, relying on *Mian*, at para 30). In its Memorandum of Argument before the RAD, Mr. Hassan raised the issue of the RPD having found that he was not a member of the Reer aw Hassan sub clan of the Shekhal clan. Mr. Hassan submitted that the RPD erred in that the identity witness confirmed the clan affiliation and this witness was found credible. Therefore, this issue was squarely before the RAD, having been raised by Mr. Hassan himself.

[15] The parties agree that, as this argument by Mr. Hassan before the Court raises an issue of procedural fairness, it is to be reviewed on a standard of correctness. I find the RAD to have acted correctly, and without any want of procedural fairness, in addressing the identity witness' evidence of clan affiliation as it did.

B. *Did the RAD treat unreasonably a letter from the Somali Immigrant Aid Organization in support of Mr. Hassan's clan affiliation?*

[16] In support of his claimed clan affiliation, Mr. Hassan submitted a letter from the Somali Immigrant Aid Organization [SIAO], which stated that many community members know his family and that community elders have confirmed that the family are from the clan of Reer Ohassan. The RAD found it problematic that the RPD had not addressed this letter, and the RAD therefore conducted its own independent assessment of this evidence.

[17] The RAD noted that the letter does not indicate the efforts that the organization went through to identify the many community members who know Mr. Hassan's family and does not provide the identities of those individuals. The RAD found it reasonable to expect that, given the importance of the establishment of Mr. Hassan's identity, information on the identities of these individuals would be included with the letter, or the letter would be accompanied by declarations from at least some of them. The RAD also found that the letter does not make clear to what extent its authors relied on information provided by Mr. Hassan himself. It also does not indicate whether the organization verified the information of Mr. Hassan or those whom they consulted. The RAD found the letter to have little probative value and that, even if it was to be given more

weight, it was insufficient to overcome the totality of the findings with respect to Mr. Hassan's clan affiliation.

[18] The parties agree that this finding is reviewable on a standard of reasonableness. Mr. Hassan's argument is that the RAD impugned the letter for what it did not say and should instead have focused on what it said. He also relies on the decision of Justice Boswell in *Ibrahim v Canada (Minister of Citizenship and Immigration)*, 2016 FC 11 [*Ibrahim*], which found the RAD to have erred in discounting and discrediting a letter from the SIAO, offered in evidence to establish a claimant's identity, by comparing the SIAO's practices for verifying the identities of individuals to the practices of other Somali organizations.

[19] I do not find the RAD's analysis in the case at hand to be comparable to that which was criticized by Justice Boswell in *Ibrahim* or otherwise to be unreasonable. The RAD considered the probative value of the SIAO letter in the case at hand based on its analysis of the information contained in that letter, including how that information was or was not verified, without reference to the standards or practices of other organizations. Mr. Hassan's argument amounts to a disagreement with the RAD's weighing of the evidence, which is not a ground for review of the decision.

C. *Did the RAD treat unreasonably a Response to Information Request in the National Documentation Package for Somalia?*

[20] The Response to Information Request [RIR], to which this issue relates, addressed the return of members of the Somali diaspora to live in Somalia and particularly in Mogadishu. The RAD considered this evidence in the context of Mr. Hassan's submission that he was at risk from Al Shabaab upon return to Somalia because they target returnees. The RAD noted from the RIR that, according to sources, Al Shabaab has made threats specifically against diaspora returnees. The RAD noted that the RIR also includes information stating that Al Shabaab no longer controls Mogadishu but continues to carry out periodic attacks in Mogadishu. The RAD stated that there are reports of civilian casualties but no evidence on the incidence of specific attacks on members of the diaspora or that they are disproportionately targeted by Al Shabaab.

[21] The RAD also noted from the RIR that there is improved stability and security in Somalia which has prompted members of the Somali diaspora to return to their country of origin. It found that Mr. Hassan had not established that there is a serious possibility of persecution or likelihood of death or cruel or unusual treatment or punishment if he were to return to Somalia.

[22] Mr. Hassan argues that the RAD erred in relying on the absence of evidence that returning Somalis are disproportionately targeted by Al Shabaab. He also submits that the RAD was selective in its reliance on the evidence in the RIR, in that the document states that returnees usually return for a temporary period rather than to settle. The parties agree that this issue is to be reviewed on a standard of reasonableness.

[23] I find no error in this aspect of RAD's decision. Consistent with the RAD's analysis, the RIR does refer to the voluntary return of Somalis to their areas of origin. Mr. Hassan is correct

that the same document also refers to Somalis often returning on a temporary rather than permanent basis. However, I do not regard this evidence to be inconsistent with the RAD's conclusion that members of the Somali diaspora are returning to their country and its reliance on the evidence to this effect in rejecting Mr. Hassan's argument that he will be at risk upon return.

[24] Similarly, I cannot conclude that the statement by the RAD, that there is no evidence that members of the diaspora are disproportionately targeted by Al Shabaab, renders its decision unreasonable. The RAD acknowledged that there are civilian casualties resulting from attacks by Al Shabaab and was therefore conscious of the general risk of violence from Al Shabaab. I interpret the RAD's analysis to be that, despite threats by Al Shabaab directed at returnees, it found no evidence that returnees were at greater risk than the population generally. As correctly argued by the Respondent, this is an element of an analysis under section 97 of IRPA, which it was appropriate for the RAD to undertake in the context of Mr. Hassan's argument that, independent of his clan affiliation, he would be at risk because of his status as a returnee.

V. Conclusion

[25] In his written submissions to the Court, Mr. Hassan raised additional arguments to the effect that the RAD breached procedural fairness in impugning the credibility of evidence from Wikipedia without giving Mr. Hassan an opportunity to establish its history, and that the RAD erred in impugning Mr. Hassan's credibility under his section 97 claim on the basis that he had not applied for permanent residence in South Africa. Mr. Hassan did not pursue these arguments in oral argument. I have nevertheless considered these arguments based on his written submissions and find no resulting reviewable errors by the RAD.

[26] Having found that none of Mr. Hassan's arguments identify a reviewable error by the RAD, this application for judicial review is dismissed.

VI. Certified Question

[27] Mr. Hassan proposed for certification for appeal the following question: "Can the Refugee Appeal Division raise new issues only if failing to do so would risk an injustice?" This proposed question is derived from the jurisprudence in and following *Mian* to the effect that, although an appellate court has jurisdiction to raise a new issue, this would be rare and only when failing to do so would risk an injustice.

[28] Having found that the determination of the RAD in the present case was not based on a new issue, an appellate decision on this proposed question would not be determinative of an appeal of my decision. Therefore, no question is stated for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is stated for certification for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5305-15

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