

Federal Court



Cour fédérale

Date: 20160919

Docket: IMM-580-16

Citation: 2016 FC 1061

Ottawa, Ontario, September 19, 2016

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

NASTEH ABDI DUBAT

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant Mr. Nasteh Abdi Dubat is a citizen of Somalia. Mr. Dubat came to Canada in September 2014 and asked for refugee protection, alleging he would fear for his life if returned to Somalia because he would be forcibly recruited or killed by Al-Shabaab, a majority clan and terrorist group operating in Somalia.

[2] In October 2015, the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada concluded that Mr. Dubat was not a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD found that Mr. Dubat had not provided sufficient credible evidence in support of his claim of persecution at the hands of Al-Shabaab. Mr. Dubat appealed the RPD decision to the Refugee Appeal Division [the RAD], arguing that the RPD failed to properly deal with his alleged risks, to consider “cumulative grounds” rising to persecution and to assess the “compelling reasons” arising out of previous persecution. In January 2016, the RAD dismissed Mr. Dubat’s appeal and confirmed the RPD decision.

[3] Mr. Dubat now seeks a judicial review of the RAD decision, raising before this Court three questions he had brought before the RAD in appeal of the RPD decision. Mr. Dubat claims that the RAD erred in failing to analyze an argument made by Mr. Dubat on the threats faced by returnees to Somalia, in concluding that there was no cumulative persecution, and in finding no “compelling reasons” in his case. He asks this Court to quash the RAD decision and to order that a different panel reconsider his appeal of the RPD decision.

[4] The sole issue to be determined is whether the RAD decision is reasonable, and more specifically whether any of the three aspects of the RAD decision disputed by Mr. Dubat is unreasonable.

[5] For the reasons that follow, I conclude that Mr. Dubat’s application for judicial review must be dismissed. Having reviewed the RAD decision, the evidence before the decision-maker

and the applicable law, I find no basis for overturning the tribunal's findings. I am satisfied that the RAD applied the correct tests, conducted its own analysis and thoroughly reviewed the evidence. On each question identified by Mr. Dubat, the RAD decision falls within the range of possible, acceptable outcomes based on the facts and the law. There is no reason justifying this Court's intervention.

II. Background

A. *The factual context*

[6] Mr. Dubat was born in 1990 in Somalia and raised in Mogadishu, the country's capital. He is part of the Madhibaan/Midgaan clan, a so-called "occupational group" minority clan in Somalia.

[7] In December 2006, Mr. Dubat left Somalia to go to Kenya, where he lived in the capital Nairobi from January 2007 to December 2013. He then left Kenya to arrive in the United States in February 2014, after transiting through several countries. Mr. Dubat claimed asylum in the United States, but his application was dismissed. He subsequently claimed refugee status upon his arrival in Canada in September 2014.

B. *The RPD decision*

[8] Mr. Dubat submitted to the RPD that when he was in Somalia, his father disappeared and his older sister was raped and killed in 2006 by a Hawiye Militia called the Moryan. In light of

those events, he fears returning to Somalia because, according to Mr. Dubat, he would either be forcibly recruited or killed by Al-Shabaab. Mr. Dubat however acknowledged that he had not personally experienced any threats or attacks by Al-Shabaab in Somalia. The RPD further noted that the Operational Guidance Note on Somalia prepared by the United Kingdom Home Office and part of the National Documentation Package [NDP] stated that “it [was] unlikely that a proposed return to Mogadishu at the present time will raise Refugee Convention issues”. The NDP on Somalia also indicated that Al-Shabaab withdrew from Mogadishu in 2011, though it recognized that the group attacked the civilian population in the past.

[9] Considering that a general threat from a radical group such as Al-Shabaab does not establish the nexus necessary under section 96 of IRPA, the RPD concluded that Mr. Dubat was not a Convention refugee. The RPD also found that the risk of violence feared by Mr. Dubat was not different than the generalized risk faced by all citizens of Somalia, and that Mr. Dubat was not a person in need of protection under section 97 of IRPA either. The RPD thus rejected Mr. Dubat’s claim.

C. *The RAD decision*

[10] Before the RAD, Mr. Dubat alleged that the necessary nexus existed to make him a Convention refugee under section 96 of IRPA, because he was a man of minority clan membership returning to Somalia after a long absence and because he was a diaspora returnee. Therefore, he would be targeted by Al-Shabaad for recruitment or death. Mr. Dubat also claimed that the RPD erred in failing to consider “cumulative grounds” rising to persecution and the existence of “compelling reasons” arising out of previous persecution.

[11] In its decision, the RAD first reiterated the test under each of sections 96 and 97 of IRPA. If a risk is so generalized that it applies for “the great majority of the population”, then a person cannot be considered as a person in need of protection under section 97, as this section applies to a personal risk. Under section 96, a nexus between the persecution feared and a Convention ground is necessary.

[12] The RAD found that Mr. Dubat failed to establish the nexus required under section 96. While a generalized risk remains in Mogadishu, the NDP shows that there are no longer “clan related” conflicts in Somalia. In addition, while it is true that Al-Shabaab still carries out attacks against civilians, those actions most often target journalists, members of Parliament, NGOs and people in the public eye, none of which corresponds to Mr. Dubat’s profile. Furthermore, as only a generalized risk exists, Mr. Dubat was not found to be a person in need of protection under section 97.

[13] The RAD recognized that “Mogadishu is not a safe place in which to live”. However, it added that many places in the world are not safe, and that does not mean people from all these places can become refugees. Under section 96 of IRPA, a well-founded fear of persecution is necessary, and the RAD was of the view that Mr. Dubat is not facing persecution in Mogadishu, nor is he facing a personal risk.

[14] Mr. Dubat also claimed before the RAD that the panel should have considered “cumulative grounds” rising to persecution. However, the RAD found that it was not possible to “assign a motive of ethnic hatred/violence” to the rape and murder of Mr. Dubat’s sister simply

because the killer and the victim allegedly belonged to two different ethnic backgrounds. The RAD also considered that it would be speculative to make a finding regarding the reasons why Mr. Dubat's father disappeared. As a result, the RAD concluded that there was insufficient evidence to support a "cumulative grounds" argument.

[15] Turning to the "compelling reasons" exception set out in subsection 108(4) of IRPA, the RAD noted that the claimant must first demonstrate that he has suffered, at some point in the past, a form of persecution, torture or cruel and unusual treatment or punishment. The persecution must have been such that the person would have been found to be a Convention refugee if he or she had sought protection at the time. The RAD found that this was not Mr. Dubat's case. Considering that Mr. Dubat testified to the effect that he had not been previously targeted or threatened by Al-Shabaab, the submissions he made regarding his father and sister were not found to be sufficient by the RAD to satisfy the "compelling reasons" provision.

[16] Finally, the RAD observed that clan affiliation was not a major issue in Mogadishu anymore. The RAD found that it was possible that Mr. Dubat "may face some minor forms of discrimination from majority clan members, however, the evidence indicate[d] that such discrimination will not rise to the level of persecution". There was therefore no objective basis to Mr. Dubat's fear as he only faces a generalized risk.

[17] As a result, the RAD dismissed Mr. Dubat's appeal, finding that he was neither a Convention refugee nor a person in need of protection.

D. *The standard of review*

[18] The RAD’s application of the law to the facts and its assessment of credibility is a question of mixed facts and law for which the standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 47 and 53; *Basran v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1221 at para 19; *Niyas v Canada (Citizenship and Immigration)*, 2015 FC 878 at para 23; *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725 at para 45).

[19] When reviewing a decision on the deferential standard of reasonableness, the analysis is concerned with the existence of justification, transparency and intelligibility within the decision-making process, and a decision-maker’s findings should not be disturbed as long as the decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at para 47). In conducting a reasonableness review of factual findings, it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 99). Under a reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 17).

III. Analysis

A. *The RAD did not fail to consider an argument made by Mr. Dubat*

[20] According to Mr. Dubat, Al-Shabaab made clear threats against returnees, stating that they will be killed and fought against as if they were part of the Somali government. Mr. Dubat claims that the RAD failed to deal with this particular argument as it did not specifically refer to the threat to returnees in its decision, even though taking such a threat in consideration could establish the required nexus under section 96 of IRPA. Relying on *Chamberlain v Canada (Attorney General)*, 2012 FC 1027 [*Chamberlain*], Mr. Dubat argues that the RAD had a legal obligation to consider this threat separately from the threat to clan members returnees, and that the RAD's failure to deal with this issue is a reviewable error (*Chamberlain* at paras 82-83). Mr. Dubat pleads that the RAD erred in law in omitting to assess this argument and that its finding of an absence of nexus is thus unreasonable.

[21] I disagree and instead conclude that the RAD's decision on this front fits well within the boundaries of reasonableness.

[22] While counsel for Mr. Dubat ably attempted to frame this issue as a failure to deal with a legal argument, I observe that Mr. Dubat's submission essentially revolves around the alleged omission by the RAD to refer to a specific document in the tribunal record. On the facts of this case, I am not convinced that the RAD can be faulted for having ignored a *legal argument* made by Mr. Dubat. The reference made by Mr. Dubat to the threat of persecution against returnees, separate from the threats against returning minority clan members, does not amount to a distinct

legal argument. It is rather, in my view, one other element in the evidence allegedly supporting the legal argument regarding the existence of a nexus between the persecution feared by Mr. Dubat and a Convention ground.

[23] The current situation is quite different from the *Chamberlain* case cited by Mr. Dubat, where the decision-maker completely failed to even address and consider a discrete claim of human rights violation in its decision. Here, it is simply some evidence on threats to returnees made by Al-Shabaab that, according to Mr. Dubat, the RAD did not specifically address.

Mr. Dubat also attempts to rely on *Olow v Canada (Minister of Citizenship and Immigration)*, 2016 FC 245 but this is not of great assistance to his position. In that decision, Madam Justice McDonald had found that the RAD had never discussed the risk of forced recruitment by Al-Shabaab despite uncontradicted evidence of detention and torture suffered by the applicant.

[24] I acknowledge that the RAD decision does not explicitly mention Mr. Dubat's separate point on the "threats to returnees" in general. However, a reading of the decision reveals that, contrary to Mr. Dubat's claim, the RAD did turn its mind to the matter and did address the overall issue of Al-Shabaab targeting returnees. The RAD found that Al-Shabaab was "no longer in control of Mogadishu" and that a return would therefore not put Mr. Dubat "at risk of persecution for a Convention ground". In other words, the RAD indirectly addressed the general issue of threats to returnees posed by Al-Shabaab, through its consideration of Al-Shabaab's vanishing presence in Mogadishu.

[25] It is well recognized that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ no 598 (FCA) at para 1). A decision-maker is not required to refer to each and every piece of evidence supporting its conclusions if the reasons permit the Court to understand why the decision was made and determine whether the conclusion falls within the range of possible, acceptable outcomes (*Newfoundland Nurses* at para 16). Similarly, a failure to mention a particular piece of evidence does not mean that it was ignored. It is only when a tribunal is silent on evidence clearly pointing to an opposite conclusion that the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact. (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 (FCTD) at paras 16-17). This is not the case here, as the evidence on returnees was clearly referred to and the facts contained in Mr. Dubat's submissions were taken into consideration by the RAD.

[26] The reasons are to be read as a whole, in conjunction with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3). A judicial review is not a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54). The Court should instead approach the reasons with a view to "understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression" (*Ragupathy v Canada (Citizenship and Immigration)*, 2006 FCA 151 at para 15).

[27] In the present case, it is true that the RAD did not refer specifically to the particular piece of evidence singled out by Mr. Dubat. However, this issue of whether a returnee would be at particular risk in Somalia because of Al-Shabaab was analyzed by the RAD, in general and for minority clan members. Indeed, the RAD acknowledged Mr. Dubat's claim that "there is a nexus as he is a young man of minority clan membership returning to Somalia after a lengthy absence that will be targeted by Al-Shabaab for recruitment or death". On this matter, the RAD reviewed the NDP and noted that it clearly stated "that persons returning from abroad are not at a particular risk because of clan affiliation, including minority clan affiliation", that clan affiliation is no longer an issue in Mogadishu and that "Al-Shabaab is not targeting people with [Mr. Dubat's] profile". Later in the decision, the RAD mentioned the limited presence of Al-Shabaab in Mogadishu since 2011 and the fact that Mr. Dubat would therefore not be at risk if he returned.

[28] The language used by the RAD in its decision could perhaps have been clearer in certain respects and could have explained in more detail how it reached its conclusion on the alleged threat to returnees in general. However, it certainly does not fall outside the range of acceptable, possible outcomes. The RAD has not overlooked any important factor nor has it misapprehended the circumstances of Mr. Dubat. Under the reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, a reviewing court should not intervene even if its assessment of the evidence might have led it to a different outcome. This is the situation here.

B. *The RAD did not err in concluding that there was no cumulative persecution*

[29] As a second argument, Mr. Dubat submits that the RAD erred in finding that he cannot be a Convention refugee on the ground of cumulative persecution. Mr. Dubat pleads that, when he was in Somalia, his sister was raped and killed, his father disappeared, and the rest of his family fled. He notes that the RAD itself recognized that “Mogadishu is not a safe place in which to live” and that a “generalized risk does exist in Mogadishu”.

[30] Mr. Dubat refers to the Federal Court of Appeal decision in *Canada (Citizenship and Immigration) v Munderere*, 2008 FCA 84 at para 39 and relies on the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, January 1992, UNHCR 1979 [the Handbook].

Paragraph 53 of the Handbook states that “it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status”. The Handbook also adds that non-nexus issues are relevant and that the outcome “will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context”.

Mr. Dubat advances that, since the RAD found that he “will likely face discrimination to some degree upon his return to Mogadishu”, this was sufficient to establish the required nexus. Given that there was no basis to reject Mr. Dubat’s conviction that his sister was killed because of her clan, Mr. Dubat pleads that he has demonstrated cumulative persecution.

[31] I am not convinced by Mr. Dubat’s analysis on this question.

[32] It is well established that while motivation can be mixed, some component of discrimination must have a nexus to a Convention ground in order to be considered as persecution under section 96 of IRPA. The fact that the RAD acknowledged that Mr. Dubat would likely face discrimination in Mogadishu therefore does not necessarily establish the required nexus. Discrimination does not always equate with persecution; in some cases, it may not be serious enough to rise to the level of persecution. The jurisprudence is also clear to the effect that an acknowledgement that a person might suffer from discrimination does not necessarily mean that the person is persecuted (*Kwiatkowsky v Minister of Employment and Immigration*, [1982] 2 SCR 856 at 863; *Al-Mahamud v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 521 at para 8).

[33] The RAD found that Mr. Dubat might face discrimination if he was to be returned in Somalia, but it also found that “such discrimination will not rise to the level of persecution”. As to what happened to his sister, father and family, the RAD analysed and weighted the evidence before concluding that these events were insufficient to conclude to cumulative persecution. The RAD found insufficient evidence as to the person who raped and killed Mr. Dubat’s sister and as to the motives behind the crime. It found impossible to “assign a motive of ethnic hatred/violence to a murder simply because the killer and the victim were allegedly of different ethnic backgrounds”. As for Mr. Dubat’s father, the RAD concluded that it would be speculative to try to determine the causes of his disappearance. I am not convinced that these conclusions are unreasonable in light of the evidence on the record.

[34] Mr. Dubat may well have some real or strong beliefs about the expected discrimination he may face, but his conviction about it does not make it true or credible. Further to its review, the RAD concluded that there was insufficient evidence to make this finding. For granting refugee status, a “well-founded fear of persecution” must be proven, and discrimination does not necessarily amount to persecution. On that issue, the Handbook indicates that a simple difference in treatment is not enough to amount to persecution.

[35] In its decision, the RAD does not suggest or imply that a nexus is needed on every point in order to conclude to cumulative persecution. Instead, the RAD considered the issue of cumulative persecution raised by Mr. Dubat but found insufficient evidence to support it. The RAD reviewed all of the relevant factors, weighted the evidence and did not make any mistake in applying the legal principles. In such circumstances, the Court should not intervene. The RAD decision on the issue of cumulative persecution has the required attributes of justification, transparency and intelligibility within the decision-making process.

C. *The RAD did not err in concluding that there were no “compelling reasons”*

[36] Finally, Mr. Dubat contends that the RAD erred in finding that Mr. Dubat would not have been found to be a Convention refugee if he had sought protection in the past and in concluding that the “compelling reasons” exception in subsection 108(4) of IRPA did not apply in this case. Mr. Dubat argues that, since Mr. Dubat was a minor in 2006, the RAD should have looked at the issue from that perspective and should have adopted a child-sensitive approach to determine the question of past persecution at the time Mr. Dubat was in Somalia. Referring to the *UNHCR Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of*

the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees [the Guidelines], Mr. Dubat contends that it was unreasonable for the RAD not to find that the disappearance of his father, the rape and death of his sister and displacement of his family did not equate to persecution for Mr. Dubat, as he was a minor at that time.

[37] I disagree.

[38] “Compelling reasons” under subsection 108(4) of IRPA allow a person that could not otherwise be accepted as a refugee, because the reasons for which he sought protection have ceased to exist, to still be granted refugee protection. In order to benefit from this exception, an applicant must first prove that he or she had a valid refugee claim and that the reasons for the claim have ceased to exist, and second that his or her past persecution was so appalling that this person should not be expected to return (*Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 at para 5).

[39] There is no jurisprudence or authority supporting Mr. Dubat’s proposition that the test for persecution would be different for a minor. Counsel for Mr. Dubat indeed recognized this at the hearing before the Court. Whether a refugee claimant is a minor or an adult, the only obligation for the RAD is to take each particular situation in consideration when assessing the threat of persecution, torture or cruel and unusual treatment or punishment. In this case, the RAD found insufficient evidence showing that Mr. Dubat had suffered persecution in the past in Somalia. The fact that he was a child at the time does not change anything. The RAD could have elaborated further on the status of Mr. Dubat as a 16-year-old minor in 2006, but I am not

persuaded that the RAD was not alert to and mindful of Mr. Dubat's situation when he was in Somalia.

[40] In this case, the RAD concluded that the compelling reasons did not apply to Mr. Dubat, as he had not previously been personally targeted or threatened by Al-Shabaab, based on Mr. Dubat's own testimony. He had therefore never personally suffered from persecution. The RAD was not persuaded either that the evidence regarding the disappearance of his father, the rape and death of his sister and the displacement of his family amounted to persecution. It found the evidence insufficient, speculative and inconsistent with the NDP to link it to a clan affiliation.

[41] The RAD did not disregard or ignore what happened to Mr. Dubat's family nor Mr. Dubat's age. Once again, I find that the RAD decision is justifiable, transparent and intelligible within the decision-making process. Deference is owed to the RAD and it is not this Court's role to reweigh the evidence presented before the RAD.

IV. Conclusion

[42] For the reasons detailed above, the RAD decision represented a reasonable outcome based on the law and the evidence. Therefore, I must dismiss Mr. Dubat's application for judicial review. Neither party has proposed a question of general importance for me to certify, and I agree there is none.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs;
2. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-580-16

STYLE OF CAUSE: NASTEH ABDI DUBAT v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 15, 2016

JUDGMENT AND REASONS: GASCON J.

DATED: SEPTEMBER 19, 2016

APPEARANCES:

Mr. Micheal Crane FOR THE APPLICANT

Ms. Judy Michaely FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario