Federal Court Cour fédérale

Date: 20180726

Docket: IMM-5542-17

Citation: 2018 FC 782

Ottawa, Ontario, July 26, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ABDIRISAQ FARAH ABDULLAHI

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] This judicial review application made pursuant to section 72 of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA] is concerned with a decision of the Refugee Appeal Division [RAD] of December 5, 2017 which set aside the decision of the Refugee Protection Division [RPD] of June 1, 2017, the said decision having concluded that the claimant, Abdirisaq Farah Abdullahi, is a refugee under section 96 of IRPA.

I. Standard of review

[2] It is not a matter of dispute that the standard of review to be applied by this Court is reasonableness. It follows that the Court must be satisfied by the applicant that the decision made by the RAD lacks justification, transparency and intelligibility in the decision-making process such that the decision does not fall within the range of acceptable, possible outcomes in view of the facts and the law. The reasonableness standard is associated with deference that is owed to the decision-maker. To put it another way, it is not for the Court to examine the merits of the case and, on the basis of a disagreement on how the case ought to have been decided, set the decision aside. The role of a superior court is to control the legality of the decision made; a decision that is unreasonable is not a legal decision (*Mission Institution v Khela*, 2014 SCC 24; [2014] 1 SCR 502, at para 74).

[3] There appears to continue to be confusion as to the role to be played by the RAD when a matter before the RAD is brought before it on appeal. It may be useful to repeat what is the standard to be applied where the RAD sits on appeal of an RPD decision. The Federal Court of Appeal decided the issue in the case of *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157 [*Huruglica*]. In most issues before the RAD, the standard of review will be correctness:

> [77] In any event, and as indicated above at paragraphs 49 and 51, the number of appeals and the time and effort required on each appeal is for the legislator to consider. I find no indication in the wording of the *IRPA*, read in the context of the legislative scheme and its objectives, which supports the application of a standard of reasonableness or of palpable and overriding error to RPD findings of fact or mixed fact and law.

> [78] At this stage of my analysis, I find that the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into an application of the correctness standard of review. If there is an error, the RAD can still confirm the decision of the RPD on another basis. It can also set it aside, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD: paragraph 111(2)(b) of the *IRPA*.

[4] The Court also determined that there are circumstances where the RPD enjoys a meaningful advantage over the RAD because the questions of fact or mixed law and fact require an assessment of the credibility or weight to be given to the oral evidence it hears (*Huruglica*, para 70). However, the Court of Appeal does not conclude that every time there is an assessment of witnesses, deference is owed to the RPD. As the Court put it, "although the RAD should sometimes exercise a degree of restraint before substituting its own determination, the issue of whether the circumstances warrant such restraint ought to be addressed on a case-by-case basis. In each case, the RAD ought to determine whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim" (*Huruglica*, para 70). In effect, the Federal Court of Appeal concludes that correctness is the standard of review except where oral evidence presented to the RPD makes it such that the matter is referred back by the RAD to the RPD for redetermination. That is what paragraph 103 of the decision states:

> [103] I conclude from my statutory analysis that with respect to findings of fact (in mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only

> when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.

[5] It follows that it is the RAD decision, having reached its own conclusion on a correctness standard, that must be the focal point of the judicial review application. In this case, the applicant limits himself to show the discrepancies between the RPD decision and the RAD decision to demonstrate that the RPD decision is superior to that of the RAD. What needs to be shown is rather that the RAD decision is not reasonable, as the notion is defined in *Dunsmuir v New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190, (reconfirmed in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, para 55). It does not suffice that the Court would prefer, arguendo, the RPD decision over that of the RAD decision if the RAD decision is a possible, acceptable outcome. That is because it is not for this Court to determine the merits of the case and to have a preference for one point of view over another. Rather, this Court considers the RAD decision to determine whether it is legal or not.

II. The RPD and RAD decisions

[6] Mr. Abdullahi alleges that he is a citizen of Somalia and that he fears a return to Somalia because of alleged Al-Shabaab targeting of him as a senior advisor to the Prime Minister of Somalia, in Mogadishu. The RPD was satisfied that Mr. Abdullahi has established his identity and his profile as a government employee. The RPD therefore found that the claimant had well-established fear of persecution in Somalia by reason of his political opinion, thereby accepting his claim under section 96 of IRPA.

[7] Following engineering studies in Malaysia, the applicant returned to Somalia in June 2014 (he would have been 24 years old at the time) and started working as a senior advisor to the Prime Minister of Somalia in Mogadishu. However, he claims that he was threatened by telephone in March 2016 because of his position in the Prime Minister's office. That would have been followed by shots fired at his car on June 1, 2016. It is alleged that the police would have told him that there was nothing they could do to protect him because these sorts of shooting incidents occur on a frequent basis. It appears that it was assumed that these incidents involved Al-Shabaab, which is known to be a terrorist organisation operating in that part of Africa.

[8] It appears that, on July 17, 2016 (or June 22, 2016), the claimant, having obtained a visa to go to Kenya, fled to Kenya with the assistance of his diplomatic/service passport. Once in Kenya, he applied for a visitor's visa for the United States and Canada. It is on September 7, 2016 that he obtained a single journey travel document to Canada with the assistance of the Somali Embassy in Nairobi, Kenya. It is unclear why the applicant had to obtain the visa from the Somalia's neighbouring country of Kenya, but with the assistance of the Somali Embassy in Kenya. The applicant entered Canada on September 11, 2016 and asked for protection on September 30, 2016.

[9] Despite concluding that the applicant was not threatened by Al-Shabaad, the RPD found that, on the basis of the applicant's profile as a government employee in Somalia, it was sufficient to accept his claim that he is a refugee, pursuant to section 96 of IRPA. That was based only on the objective documentary evidence, from various sources, that suggest that government employees in Somalia are potential targets and, more particularly, Al-Shabaab targets.

[10] In effect, the RPD found “many aspects of the claim not to be credible” (RPD, para 14). Many contradictions and discrepancies are noted, including about the shooting incident that would have been pivotal in the applicant’s decision to seek refuge. In that case, the applicant claimed he stayed in his office for seven days following the shooting, which occurred on June 1, 2016; however, he claimed having left Somalia on June 22, 2016. Again, it is not completely clear where he stayed in the meantime, other than he stayed elsewhere in the presidential palace. It is not clear either why the stamp in his passport shows a departure date of July 17.

[11] The RPD also noted discrepancies about when he obtained the travel permit to Canada as well as when he applied for the US visa and his date of marriage, “to name a few” (RPD, para 15). When confronted, the explanations were less than satisfactory.

[12] It seems that the RPD was impressed by the fact that the Canadian government accepted that the applicant worked for the Somalian Federal Government as it issued a single journey travel document from Nairobi. The applicant also gave a good account of himself as a government employee as he provided details about his job as an advisor to the Prime Minister.

[13] However, on a correctness standard of review, the RAD disagreed. It did not have to defer to the RPD and could review the whole matter to reach its own conclusion. The RAD decision is the only decision under review. It set aside the RPD decision pursuant to paragraph 111(1)(b) of IPRA and substituted the determination that ought to have been made: on a balance of probabilities, it found that the applicant is not a Convention refugee nor a person in need of protection (sections 96 and 97 of IRPA).

[14] The RAD took a decidedly dim view of the identification documents supplied by the applicant. The single journey travel document was issued by the Canadian government (restricted to a temporary resident permit valid for three weeks only, without the ability to use it to re-enter Canada) on the strength of documents on which the RAD concluded it cannot rely. As a matter of fact, the RAD notes that even the RPD acknowledged that identity documents issued by the Somali government are not accepted by numerous countries including Canada because the issuance procedure is not credible. The fact that a single journey travel document was issued by Canada is significantly discounted because of the very documents used for the purpose. Thus, the National Documentation Package [NPD] reports that Somali embassies sell passports and that the Somali foreign services operated outside the command and control of the central authorities. That is why passports or Somali identity cards, on which the RPD relied, cannot carry any weight. That they were unaltered and probably genuine does not change the fact that they are issued without the proper controls.

[15] Similarly, the RAD concludes that two letters used in support of travel to Canada must receive no weight. One was a letter from the Somali embassy in Nairobi and the other was an invitation letter from the Dixon Community Services Center in Toronto. The RAD noted at paragraph 16 of its decision:

> [16] The RAD further notes that the two letters were created simply to allow the Respondent to travel to Canada. When asked at the hearing to confirm that the letter of invitation to come to Canada was not genuine and that it was not a true invitation, he replied that the Somali Embassy informed him that they would get him a diplomatic letter and an invitation letter. He further testified that their “main goal” was to get him a visa. When questioned about the numerous inconsistencies and discrepancies in his immigration documents, he explained that the documentation had been completed by an individual at the Somali Embassy in Kenya

> who was an acquaintance of his clan leader, and that this person had filled out all the information on his behalf.

[16] There is more. The visa application prepared by the Somali Embassy in Nairobi included information that was simply false. The mentions that the applicant had travelled to Ethiopia and Djibouti were false. They were included to mislead such that the existence of travel would facilitate and improve the chances of obtaining the visa. That will explain why the RAD concludes that the information provided by the Somali Embassy is unreliable: it was tailored to get a visa, even a temporary resident visa (in this case for three weeks), to come to Canada.

[17] The RAD further accepted that money, with right connections, will allow you to obtain a passport in Kenya. In the case of the applicant, he testified that a clan leader used influence in enlisting the Somali Embassy in Kenya, thus showing the existence of those connections. It follows that the single journey travel document cannot be corroborative of the applicant's identity, being based on documentation carrying no weight.

[18] As for birth and marriage certificates, the RAD accepts the view expressed by the United States' Department of State that they are "unavailable" because "there are no credible or verifiable registrars for issuing identification cards" (RAD, para 20). The RPD relied on the applicant's profile as a Somali government employee, together with documentary evidence, to conclude that he is at risk, pursuant to section 96 of IRPA. However, if the applicant has not established his identity, it follows that the said profile has not been established either. Furthermore, the allegation, which was central to the applicant's story, that he was fired upon by Al-Shabaab in June 2016, was not believed by the RPD. According to the applicant, this incident

was such that he went into hiding until he made his way to Kenya. This alleged attack was found not to be credible: that made the RAD question even the possession of employment identification. The RAD relied, in its conclusion, on the NDP for Somalia (March 2017) where an executive director of a Somali organization in Toronto is quoted as saying that, "the level of corruption and the lack of good infrastructure in Somalia make [Somali documents] vulnerable to [be] obtain[ed] […] by anybody who wants to get them" (RAD, para 24).

[19] In a nutshell, the RAD did not accept that the applicant's identity, including having the profile of a Somali government employee, had been properly established. That being a pre-requisite to obtain a refugee status, it followed that sections 96 and 97 of the IRPA could not be successfully invoked in this case.

III. Arguments and analysis

[20] The applicant's argument is that there was a reviewable error in setting aside the RPD decision. The applicant argues that the RPD decision should not be set aside by the RAD because it falls within a range of possible, acceptable outcomes defensible in respect of the facts and the law. The case of *Dunsmuir v New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190 is cited in support of that proposition.

[21] The applicant then proceeds to argue his case on the basis that the RPD decision is superior to that of the RAD. That is not the test that the RAD followed and had to apply. It made its own decision on the basis of the record before it and did not have to defer to the RPD decision: as I have tried to show before, the test at this stage is one of correctness which implies

that there is no deference to be given to the RPD findings. From there, the case proceeds to this Court on judicial review where the RAD decision, and not the RPD decision, is on trial, but on a reasonableness standard of review. It is at this stage that the RAD decision is considered to determine if it is reasonable. As found by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; [2009] 1 SCR 339 at para 59:

> […] (a)s 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.

In effect, the judicial review does not consist so much as a contest between the decisions of the RPD and the RAD, as being rather for the Court to determine the reasonableness of one decision, that of the RAD.

[22] It remains possible that comparing the two decisions will lead to the conclusion that the RAD decision is not reasonable, in view of the strength of the other for instance. However, such is not the case here. The applicant continues to be held to the high standard of demonstrating that the RAD decision is unreasonable.

[23] The evidence is overwhelming that documents emanating from Somali authorities are unreliable. Contrary to the applicant's assertion, the RAD did not decide the matter based on the credibility of a witness who was not before it. On the contrary, it accepted the credibility finding made by the RPD which found that the shooting incident in June 2016 was not proven (RPD, para 21). It accepted that the visa application was misleading and meant to be misleading (inclusion of travel to Ethiopia and Djibouti that never occurred) and that the Somali Embassy in

Kenya worked to get him a visa. Basically, the information supplied was unreliable and tailored to get the applicant to Canada.

[24] The applicant relied on the second half of paragraph 46 of *Moin v Canada (Citizenship and Immigration)*, 2007 FC 473 for the proposition that documents ought not to be excluded when the tribunal has only suspicions that they are fraudulent. However, when the paragraph is read in its entirety, the complete proposition emerges.

> [46] It might be reasonable to conclude a piece of evidence is not genuine if an applicant's story is generally not plausible, or where specific evidence demonstrates the document is not accurate. But here, the Board essentially rejected the NAB documents because the odds of their legitimacy were against Mr. Moin. Such reasoning would in effect make it virtually impossible for refugees of some countries to substantiate their claims with personal documentary evidence. In my opinion, such a finding is patently unreasonable.
>
> [I have underlined the omitted portion of para 46]

Here, the RAD found that there is evidence that documents are simply unreliable, not merely that the odds of their legitimacy militate against it. Indeed the applicant's story is generally not plausible.

[25] Once the focus is put on the RAD decision, the applicant's burden is to show, on a balance of probabilities, that it was unreasonable in that the justification, transparency and intelligibility within the decision-making process was lacking or that the outcome reached did not fall within the range of possible, acceptable outcomes. The preference for the RPD decision expressed by the applicant does not address the issue before the Court: was the RAD decision

unreasonable? As has been repeated numerous times, it is possible that there be more than one reasonable interpretation of the facts, and even the law. Mere disagreement does not suffice.

[26] Having accepted that the applicant has a risk profile as a Somali government employee, there was sufficient objective documentary evidence tending to show that he may be a target according to the RPD. However, the RAD having found that the identity of the applicant had not been established through reliable documentation, and given that the RPD had already found that the applicant lacked credibility on his allegation, central to his claim, that he had been targeted by Al-Shabaab, concluded that identity had not been satisfactorily established. It follows that the issuance of a single journey travel document by Canadian authorities was not proof of acceptance of the applicant's employment with the Somali government. I cannot find that such conclusion is not reasonable. The fact that the applicant was authorized to come to Canada on that single journey travel document following an invitation which was bogus and with the assistance of the Somali Embassy in Nairobi which, it is acknowledged by the applicant, worked to get him a visa by misrepresenting facts about the applicant's travel experience, does not support any contention that the travel document is proof of the acceptance by Canadian authorities of the employment with the Somali government (applicant's memorandum of fact and law, para 19).

[27] Accordingly, the Court must conclude that the burden to show that the RAD decision is unreasonable has not been discharged.

IV. The Minister’s application for an extension of time to perfect the appeal before the RAD

[28] The Minister filed the required notice of appeal of the RPD decision within the period during which it had to be filed. However, the appeal was not perfected within the time limit by submitting the “Appellant’s Record” (due by July 13, 2017 and served on July 20, 2017). Thus, the Minister sought an extension of time to perfect the appeal, as provided for at rule 12(3) of the *Refugee Appeal Division Rules*, (SOR/2012-257).

[29] The decision to grant the extension of time came on July 28, 2017. It notes that it was a brief delay of a few days before the appeal was perfected and there is no prejudice in granting the extension. The brief decision notes that there is an arguable case and a continuous interest to pursue the appeal.

[30] The matter was raised on the appeal before the RAD and it was quickly dismissed. The RAD noted that the extension had already been granted; general reference to the factors considered in the July 28, 2017 decision was made.

[31] I note first that rule 302 of the *Federal Courts Rules* (SOR/98-106) provides that “an application for judicial review shall be limited to a single order in respect of which relief is sought”. This constitutes a different matter and a different judicial review application was in order. Nevertheless, a Court may order otherwise and the Court does so in this case, thus avoiding a different judicial review application in view of the nature of the remedy sought.

[32] There is no merit to the submission that the extension of time ought to have been refused. First, the applicant sought to appeal before the RAD a decision made by the RAD. It is less than clear on what authority the RAD decision to grant the extension could have been revisited by the RAD. If a decision is to be challenged, it is generally through a judicial review application. Here, it is the RAD decision to refuse to revisit the issue that appears to have been put before this Court.

[33] Second, and more fundamentally, before this Court, the applicant has the same burden as that on the merits of the judicial review application: he must show that the decision to extend the time, or to revisit the issue, was unreasonable. Nothing of the sort was done. At best, the applicant contends that the seven-day delay was not properly justified. This falls short of a demonstration that a mere extension of time for seven days ought to have been refused as being unreasonable.

[34] Thirdly, the four factors usually considered for time extensions are to be taken together. They are:

1. a continuing intention to pursue his or her application;

2. that the application has some merit;

3. that no prejudice to the respondent arises from the delay; and

4. that a reasonable explanation for the delay exists.

Canada (Attorney General v Hennelly),
244 NR 399; [1999] FCJ No 846 (QL)

[35] Contrary to what seems to be asserted by the applicant, they are to be considered together in the exercise of discretion; there is no need to satisfy fully all factors and, indeed, the list is not exhaustive. Here, the absence of prejudice, the fact that there existed an arguable case and the continuous interest in pursuing an appeal, as found by the RAD in its decision of July 28, 2017, were manifest. One adds that there was evidently no objection to the extension until the RAD heard the case and that the delay sought was very short. Although the explanation for the short delay may have been somewhat lacking, the Court cannot see any reason whatsoever to conclude that the granting of the extension of time was not reasonable.

JUDGMENT in IMM-5542-17

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. The extension of time granted by the RAD for the applicant to perfect its appeal was reasonable and, accordingly, the RAD did not err in granting such extension;

3. There is no serious question of general importance.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5542-17
STYLE OF CAUSE:	ABDIRISAQ FARAH ABDULLAHI v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 10, 2018
JUDGMENT AND REASONS:	ROY J.
DATED:	JULY 26, 2018

APPEARANCES:

Lani Gozlan	FOR THE APPLICANT
Margherita Braccio	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lani Gozlan Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney general of Canada	FOR THE RESPONDENT