Federal Court Cour fédérale

Date: 20190109

Docket: IMM-2275-18

Citation: 2019 FC 27

Ottawa, Ontario, January 9, 2019

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

HAMZA HIRE FARAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review by the Applicant, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, of a Refugee Appeal Division [RAD] decision dated April 17, 2018, dismissing the appeal of the refusal to grant the Applicant refugee status [Decision].

II. Facts

[2] The Applicant is a citizen of Somalia, born January 1, 1995. He is allegedly a member of the Horosame tribe-an under-class tribe of Somalia that resulted in his family's discrimination experiences. He allegedly assisted his father in teaching at their home Dugsi school [school] where Sufism and the Quran were taught-causing the Al Shabab, a political organization, to target his family.

[3] The Applicant testified the Al Shabab came to his home and killed his father and brother on June 10, 2015. The Applicant alleges his mother, other siblings, and himself were not home at the time. They subsequently fled to Nairobi, Kenya. The Applicant submits he is targeted by Al-Shabaab; and if returned to Somalia, the political group would perceive him as a traitor and spy for the West. His time in Canada would solidify their perception of him as a spy. They would kill him to remove the perceived threat to their organization, Islam, and the Somali society.

III. Procedural history and the Decision under review

[4] The RPD first heard and denied the Applicant's claim on February 23, 2016. The RAD subsequently allowed his appeal of the first Refugee Protection Division [RPD] decision. The RPD heard the Applicant's matter *de novo* on May 25, 2017, and rendered a negative decision on June 1, 2017. On appeal, the RAD dismissed the Applicant's claim in the Decision dated April 17, 2018, now subject to judicial review.

[5] The RAD hearing took place on April 3, 2018. The RAD accepted the Applicant's new evidence relating to a witness the Applicant alleged was a student of his late father's school, and she gave evidence. The Applicant also testified before the RAD. The RAD ultimately rejected the evidence of the new witness for credibility reasons. It found the Applicant and the new witness did not know each other in the context alleged, which further demonstrated the Applicant's general lack of credibility in relation to when he worked at his father's school and what he taught there.

IV. Issues

[6] The Applicant raises the following issues on judicial review:

A. Did the RAD err in its credibility assessment?

B. Did the RAD err by not conducting an independent assessment?

C. Did the RAD err in its assessment of risk as a returnee?

V. Standard of review

[7] In *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 57, 62, the Supreme Court of Canada holds that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 holds this Court is to review a decision by the RAD on appeal from the RPD on the standard of reasonableness. The same decision holds that the RAD is to consider the RPD's

findings on appeal on the standard of correctness, but may defer to the RPD on credibility findings "where the RPD enjoys a meaningful advantage".

[8] In *Dunsmuir*, above at para 47, the Supreme Court of Canada explains what is required of a court reviewing on the reasonableness standard of review:

> [47] A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[9] Credibility is a central issue in this case. It is therefore worthwhile to repeat the law in this respect, which I summarized in *Khakimov v Canada*, 2017 FC 18:

> [23] …To begin with, the RPD has broad discretion to prefer certain evidence over other evidence and to determine the weight to be assigned to the evidence it accepts: *Medarovik v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 61 at para 16; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867 at para 68. The Federal Court of Appeal has stated that findings of fact and determinations of credibility fall within the heartland of the expertise of the RPD: *Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238 (FCA) [*Giron*]. The RPD is recognized to have expertise in assessing refugee claims and is authorized by statute to apply its specialized knowledge: *Chen v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 805 at para 10. And see *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 at para 24 (FCA), where the Federal Court of Appeal said that the RPD:
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>> … is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless

> they are perverse, capricious or made without regard to the evidence.
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> [24] The RPD may make credibility findings based on implausibility, common sense and rationality, although adverse credibility findings "should not be based on a microscopic evaluation of issues peripheral or irrelevant to the case": *Haramichael v Canada (Minister of Citizenship and Immigration),* 2016 FC 1197 at para 15, citing *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 10-11 [*Lubana*]; *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444. The RPD may reject uncontradicted evidence if it "is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence": *Lubana*, above at para 10. The RPD is also entitled to conclude that an applicant is not credible "because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in 'clear and unmistakable terms'": *Lubana*, above at para 9.

[10] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision is to be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

VI. Parties' positions

A. *Issue A–Did the RAD err in its credibility assessment?*

[11] The Applicant submits the RAD erred in its credibility assessment on four bases: (1) the witness, (2) when and (3) what he taught at the Dugsi school, and (4) the history of the school.

[12] First, and this speaks equally to the Applicant's first and second bases, the Applicant claims that the RAD unreasonably misapprehended the evidence of an affidavit from the new witness proffered as new evidence. The affiant testified before the RAD. She deposed she was born in the same town as the Applicant and was a student of his father. She deposed the Applicant and his brother were also students there, and that the Applicant later began to assist his father in teaching letters of the alphabet. The witness stated she attended the school and the Applicant taught during her last two years there, approximately 2010–2011.

[13] The RAD rejected this evidence due to contradictions it found between the evidence of the new witness and the Applicant's evidence. The Applicant says he taught from approximately 2011 to 2013, then resumed again in 2015. The contradiction is with his port of entry [POE] documents that state he was teaching starting in 2015. He testified the POE only requires work information after the Applicant turned 18, which is why the form indicates he began working as a teacher in 2015. However, before the RAD itself, the Applicant testified that he taught from "2011 until 2013", thus contradicting himself and the new witness. He had testified to the RPD he only assisted his father in 2015 at the school and never worked prior to 2013. In addition, while the Applicant said the school ran from "4 to 6 pm", the witness said it ran from "7 to 12". She changed her evidence in terms of what the Applicant taught from "spelling and alphabet" to also teaching Sufism.

[14] The RAD found this evidence lacking in credibility.

[15] In my respectful view the RAD's assessment in this respect is not unreasonable, particularly given the deference required by the jurisprudence that must be given to findings of credibility by the RAD as fact-finder.

[16] As to what the Applicant taught, the Applicant submits the RAD unreasonably engaged in a microscopic analysis of his testimony. In this respect the RAD found his evidence lacking in credibility:

> [17] The Appellant was asked specifically what he taught and he testified that he taught "Quranic writing and spelling". When it was asked what he means by "Quranic writing" and whether he taught Arabic, the language of the Quran, he testified that he did not and that he taught spelling and writing in Somali. He distinguished his teaching from his father's as his father taught "The Quran and Sufism." According to his mother's first affidavit, he was "condemned to death ... for teaching Dugsi and Sufism." When he was questioned on why she indicates that he taught both, he provided a confusing answer; he testified "Only my dad was teaching Sufism" and then changed his answer to say he taught "Both". When he was questioned further on this point, he said he taught "how to use prayer beads, how to praise the prophet." This contrasts with his testimony before the RPD, and initially before the RAD, when he was asked the same question and he testified that he only taught the "Quranic alphabet". When this inconsistency was put to him, the Appellant said he did not understand the question.
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> [18] I find that the Appellant provided inconsistent testimony both in his RAD hearing and before the RPD. I find the affidavit from his mother specifying the work he did was inconsistent and contradictory to his testimony and therefore lacking in credibility.

[17] I am not persuaded the RAD acted unreasonably or microscopically in the foregoing analysis or conclusion; the RAD's reasoning and conclusions are both clear and comprehensive and within its remit to assess credibility.

[18] Additionally, the Applicant submits the RAD's credibility assessment regarding his inability to answer historical questions about the Dugsi school is unreasonable. These questions included when the school was closed due to the resurgence of Al-Shabaab, where and when the teachings were held, and whether the students paid tuition. He argues the RAD failed to consider he was a minor during these events. Moreover, it was his father who ran the school, not him. So he would not know about tuition.

[19] The problem with this argument is that the Applicant was not a minor in 2015 - the year his father and brother were allegedly murdered, and the last year he allegedly taught at the school. In fact he was about 20 years old. In addition, he was over 22 years old at the time of the hearing. In light of this, I am not persuaded the RPD erred in its assessment of his evidence in this respect.

[20] Nor, with respect, am I persuaded the RPD acted unreasonably in not applying the IRB Chairperson's Guidelines for Child Refugees. The Applicant was not a child at the time of his appeal and the majority of his evidence relates to times when he was no longer a child. Therefore the Guidelines have little bearing on the reasonableness of the Decision: *Yaabe v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1633 (QL) (TD), per Heald DJ at paras 8–9. The Applicant argues he was being called upon to provide testimony regarding his teaching when he was 13 or 14 years of age. In his conflicting testimony at the RAD, however, the Applicant stated he was teaching from 2011 to 2013 and again in 2015-therefore at 16 to 20 years of age.

[21] Overall, on this aspect of the application for judicial review, I am unable to conclude the RPD acted unreasonably in making determinations on credibility on the basis of inconsistencies between the Applicant's testimony and other evidence before it, including the Applicant's POE. A decision-maker may draw negative inferences based on inconsistencies between an Applicant's POE documents and testimony: *Yontem v Canada (Minister of Citizenship and Immigration)*, 2005 FC 41, per Kelen J at para 15; *Bozsolik v Canada (Minister of Citizenship and Immigration)*, 2012 FC 432, per Rennie J at para 20; *Canada (Minister of Citizenship and Immigration) v Richards*, 2004 FC 1218, per Mosley at para 19. The Applicant failed to provide sufficient explanations for the inconsistencies to the RAD.

B. *Issue B–Did the RAD err by not conducting an independent assessment?*

[22] The Applicant submits the RAD simply upheld the RPD without conducting an independent assessment. Having reviewed the matter thoroughly I am not able to find any merit in this allegation. This case has nothing to do with Justice Diner's, with respect, accurate proposition that an "overly obsequious support for and reinforcement of all RPD findings can bring into question the independence of the RAD's analysis": *Jeyaseelan v Canada (Minister of Citizenship and Immigration)*, 2017 FC 278, per Diner J at para 19.

C. *Issue C–Did the RAD err in its assessment of risk as a returnee?*

[23] The Applicant submits the RAD erred in finding he would not be at risk from Al-Shabaab due to his Horosame sub-clan identity. The Applicant submits a review of the UNHCR Protection Considerations discloses the Applicant meets the profiles listed. For example, profile

#1 identifies as at risk persons who are associated with or perceived to be supporters of the international community. This risk profile applies to the Applicant as he has spent years in Canada. Other NDP reports document the atrocities of the Al-Shabaab targeting civilians it perceives opposes it.

[24] In response, the Respondent submits the RAD considered the Applicant's evidence and in addition, considered objective documentary evidence and reasonably found the Horosame sub-clan to be part of the Marehan clan, *not* the Midgaan clan-despite the Applicant's assertion otherwise in his BOC. The RAD also noted that in his oral evidence before the RAD, the Applicant himself admitted his clan was not part of the Midgaan clan. I find it difficult to understand how, in light of this, the Applicant may continue to argue he is part of the Midgaan clan, or that as such he experienced persecution and discrimination.

[25] In addition to inaccurately claiming membership in the minority Midgaan clan, the Applicant claims he meets the criteria for various risk profiles contained within the UNHCR Protection Considerations. There is nothing in the record showing such allegations of risk were raised before the RAD, or indeed, at any point in his claim process. The transcript of the RAD hearing reveals the only grounds of persecution relied upon by the Applicant was religion and familial membership.

[26] In my view, the Applicant's failure to bring these allegations to the attention of the RAD is fatal to his relying upon them in this judicial review. The onus was on the Applicant to assert his claim before the RAD in clear and unmistakeable terms: *Hassan v Canada (Minister of*

Citizenship and Immigration), 2006 FC 1183, per Gibson J at para 18; *Ranganathan v Canada (Minister of Citizenship and Immigration)*, 266 NR 380 (FCA), per Létourneau JA at paras 10, 11; *Paramanathan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 338, per Near J at para 19 [*Paramanathan*]; *Thuraisingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1332, per Snider J at paras 11, 12. The Applicant had the onus to make out his claim: *Paramanathan* at paras 16–19; *Mersini v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1088, per Snider J at para 8; *Mohamed v Canada (Minister of Citizenship and Immigration)*, 2015 FC 758, per de Montigny J at paras 24–28.

[27] This Court is conducting judicial review of a RAD decision. Allegations of this nature should have been brought to the attention of the RAD. This Court was not provided with any reason why the Applicant failed to raise this issue before the RAD. I also note the allegation the Applicant meets certain risk profiles was not a central basis of his claim. This allegation seems to be an afterthought. In any event it is not supported by personal evidence. The Applicant was represented by counsel at the RAD who did not raise the issue of the additional risk profiles.

VII. Conclusion

[28] In my view, the RAD's credibility findings were open to it on the facts, including the record before the RPD and the record before the RAD, the latter supplemented the Applicant's testimony and his new witness whose evidence was found to lack credibility. As such I have concluded the RAD acted reasonably in its credibility assessments and in upholding those of the RPD. There is no merit to the argument the RAD failed to conduct an independent assessment. Likewise the Applicant's arguments concerning clan membership were without merit. And as

noted, I am not persuaded the RAD decision should be overturned on the basis of newly raised profile arguments.

[29] Upon examining the Decision as an organic whole, this Court concludes it falls within the range of possible, acceptable outcomes that are defensible on the facts and law. Therefore judicial review will be dismissed.

VIII. Certified question

[30] Neither party proposed a question of general importance for certification, and none arises.

JUDGMENT in IMM-2275-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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