



Cour fédérale

Date: 20190305

Docket: IMM-2361-18

Citation: 2019 FC 266

Ottawa, Ontario, March 5, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

YUSUF OMAR MOHAMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

- I. <u>Introduction</u>
- [1] This is a judicial review of a decision of the Refugee Protection Division ["RPD"] denying refugee status to Yusuf Omar Mohamed [the "Applicant"].

[2] The RPD was not satisfied that the Applicant had a well-founded fear of persecution. Given that the RPD member did not find his claims of belonging to a minority persecuted clan (the Madhiban) credible, the Applicant was found to not be a person in need of protection.

II. Background

- [3] The Applicant was born in Mogadishu, Somalia, on February 1, 1970. In or around 1991, in the context of the civil war, the Applicant alleges that he was shot in the right leg by militia members belonging to the Hawiye clan, a powerful majority clan in Somalia. He was able to escape to a Kenyan refugee camp, where he lived with other members of his family for over a decade.
- [4] The Applicant claims to be a member of the Madhiban tribe. The Madhiban tribe (also known as the "Midgaan", "Gabooye", or "Gaboye") are an oppressed "low caste" tribe in Somalia that are traditionally discriminated against and barred from a plethora of economic and social opportunities.
- In or around 1993, the Applicant married Saynab Hussein Arale in Kenya, he knew her in Somalia, and was in the same refugee camp as he was. She came to the United States ["US"] before he did and met someone else, so when he arrived in the US they separated. His ex-wife in contradiction said they married in Mogadishu in 1993. The Applicant explained this contradiction by stating that his ex-wife invented this narrative to avoid paying him during their divorce.

- [6] At the hearing, it was clarified that the Applicant has five children that are US citizens in Minnesota, and three other children in their 20s from a first marriage that were not listed on the Basis of Claim Form. Those three children lived in Somalia from 2005 to 2017, but they now live in Sudan.
- In or around 2004, the Applicant was granted derivative asylum status in the US as a dependent spouse of his wife Saynab Hussein Arale. The Applicant was divorced from his wife on May 13, 2005. Because of his divorce, the Applicant was ineligible for adjustment of asylum status, which was confirmed by a letter from US Citizenship and Immigration on August 11, 2010. After the divorce, the Applicant continued living in the US without clear legal status.
- [8] He made his living in the US as a limo driver. The Applicant indicated that he mostly stayed in Minneapolis, but the company he worked for had work in both the state of Washington and Minneapolis. The Applicant's driver's licence was a Washington state license.
- [9] The Applicant indicated that he is in communication with his mother and siblings that live in Kenya, and with a brother who is in Washington. His mother now lives in Kenya but had lived in Mogadishu, then in Switzerland for 10 years before going back to Somalia and finally Kenya.
- [10] In or around 2017, the Applicant heard that other Somalis were having their status revoked by the Trump administration. This prompted him to decide to claim refugee status in Canada.

- [11] On or about March 12, 2017, the Applicant went to the border and entered at the Emerson Port of Entry to make a refugee claim. The Applicant made this claim on or about March 13, 2017. The Applicant confirmed that he had a nephew in Canada, Yasin Ahmed Osman, who is a Canadian citizen. Therefore, the Applicant met one of the exceptions to the Safe Third Country Agreement.
- [12] On August 17, 2018, an RPD panel was convened to hear the Applicant's claim. The Applicant was represented at the hearing. The Applicant had an interpreter, and as such, provided answers in both English and Somali.
- [13] At the conclusion of the hearing, the RPD member indicated he would take a break so he could see if he could render an oral decision. The RPD member, roughly a half hour after the conclusion of the testimony, gave the impugned negative oral decision.
- However, given the Applicant's particular status (as a foreign national who made the claim by coming to Canada from a country that is a signatory to the Safe Third Country Agreement), the Applicant is not eligible to appeal the negative RPD decision to the Refugee Appeal Division ["RAD"] under paragraph 110(2)(d) of *Immigration and Refugee Protection Act*, SC 2001, c 27 ["*IRPA*"]. Section 110(2)(d) expressly bars the Applicant from reviewing the RPD decision before the RAD.
- [15] I will dismiss this application for the reasons that follow.

III. Issues

[16] The issues are:

A. Did the RPD member come to an unreasonable or procedurally unfair conclusion?

IV. Standard of Review

[17] The questions of mixed law and fact will be reviewed on a standard of reasonableness, and the question of statutory interpretation also be weighed on a standard of reasonableness. The procedural fairness issue will be reviewed on a standard of correctness as per *Dunsmuir v New Brunswick*, 2008 SCC 9.

V. Analysis

- [18] The Applicant argued there are three reviewable errors in this decision:
 - The first argument is that the RPD member erred by finding that "corroboration" was
 necessary, and so the decision is flawed by being based on lack of corroboration and not
 a lack of consistency;
 - Secondly, the country condition documents relied on by the RPD member do not match
 the profile the Applicant presented as the documentary evidence is regarding Somaliland,
 not Somalia.
 - The third error argued at the hearing is that immediately issuing an oral decision (in contrast to not reserving the decision) was an error. This error was evidence the applicant says in relying on Somaliland documentary evidence and when the decision maker

errored in stating that the Applicant had a right of appeal and could supplement his application in an appeal, when in fact there was no right of appeal. The Applicant argues that these errors likely would not have occurred if the decision maker had reserved the decision.

- [19] I find that many of the issues as identified by the Applicant have sub-issues and overlap with each other, so I will deal with them with headings that could be seen as topics of concern.
- [20] In addition, counsel indicated they still relied on their arguments advanced in the written material, even if not argued at the hearing. In considering the remaining arguments, I see no arguments that would be successful.
- A. Did the RPD member come to an unreasonable or procedurally unfair conclusion?
- [21] The RPD member was not satisfied that there was credible evidence to determine that there was a "serious possibility" that the Applicant would be persecuted on a Convention ground. As well, the RPD member was not satisfied that, on a balance of probabilities, there were substantial grounds to believe that he would be tortured, or at risk of losing his life or being subjected to cruel and unusual treatment or punishment if he was deported to Somalia.
 - (1) Use of the word "corroboration"
- [22] The Applicant states the presumption of credibility was not properly understood by the RPD member. The Applicant argued that the absence of corroborating evidence in the country

condition information cannot rebut the presumption of credibility. While the Applicant concedes that the RPD member noted that the member must presume the Applicant to be credible, the Applicant argues that the presumption of credibility means that objective evidence and corroboration are unnecessary. The presumption of credibility cannot, in the Applicant's estimation, be rebutted by the absence of objective evidence or corroboration (*Dayebga v Canada (Citizenship and Immigration)*, 2013 FC 842 [*Dayebga*]; *Ortega Ayala v Canada (Citizenship and Immigration)*, 2011 FC 611 [*Ayala*]).

- [23] In his Reply Memorandum, the Applicant points to paragraph 12 of the decision, where the RPD member stated, "And so, I'm not able to see corroboration in the documentary evidence of..." The Applicant argues that the sentence clearly shows that the RPD member erroneously required corroborative evidence, and moreover, that because the RPD member began the sentence with "and, so", the phrase signals that the conclusion is based on the lack of corroborative evidence.
- [24] The Applicant says that this is in direct contradiction with Justice Mactavish's approach in *Cao v Canada (Citizenship and Immigration)*, 2012 FC 694 [*Cao*] and Justice Muldoon's approach in *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 [*Valtchev*]. In the Applicant's assessment, *Cao* and *Valtchev* stand for the proposition that a contradiction can only exist between a claimant's testimony and country condition information if the country condition information excludes the possibility that events happened in the manner that the Applicant described.

- [25] As discussed earlier, I do not agree with the Applicant's submissions, in general, around the question of "corroborating evidence" in contrast to "contradictory evidence". The decision maker fully appreciated the presumption of credibility of sworn evidence based on the evidence before it. When questioned if the RPD member simply misspoke, the Applicant argued that if this was true the RPD member would have corrected the decision when he received the transcript after the oral decision. However, the RPD member did not, so, according to the Applicant, this demonstrates that there was deliberate use of the word.
- [26] I agree with the Respondent that the decision, when read holistically, does properly focus on the Applicant's contradictory evidence in relation to the country condition information.
- [27] The RPD member found that the Applicant lacked credibility on the following grounds:
 - i) The RPD member found, most critically, that he did not find the Applicant's claim of belonging to the oppressed Madhiban minority to be credible. The decision maker found that members of Madhiban minority groups would likely not have been able to attend school, and that the Applicant's family had privileges (including possessing land and livestock) that should not have been available to Madhiban members. The decision maker based this finding on the country condition documentation before him;
 - ii) The RPD member found that the letter issued from the Loyan Foundation (which was put forward to confirm the identity of the Applicant and his membership in the Madhiban minority group) was inconsistent with what the Applicant had stated. The RPD member found that the letter was signed by a different person than the one that the Applicant stated that he had been interviewed by. This demonstrates that a proper process was not

- followed, and that conclusions were therefore made by the Loyan Foundation without a proper basis;
- iii) The RPD member drew an adverse inference from the fact that the Applicant omitted a number of material facts. Firstly, the RPD member found that the Applicant was untruthful in the Best Interest of the Child about the existence of other children that he had. The RPD member rejected the Applicant's explanation that he had not disclosed his other children because his ex-wife told him that he was to have nothing do with his other children. The RPD member also drew an adverse credibility inference from the fact that the Applicant did not document his residency in Washington state in his Schedule A form (despite the fact that the Applicant had provided identification documents from Washington state).
- iv) The RPD member found that although there is a medical report which points towards scarring that was consistent with a previous gunshot wound, the RPD member found that the medical report does not establish who shot the Applicant, what the circumstances of him being shot were, and whether there was a forward-looking risk.
- [28] While I recognize that the RPD member does utilize the term "corroboration" at page 6 in reference to the documentary evidence before him, I find that the usage of this word does not affect his decision, as he notes clearly, "[a]nd really, my conclusion today doesn't come so much from issues of internal inconsistencies or contradictions within the claimant's own evidence. It's really the differences that I've noted between his evidence and the objective country documentation about the Madhiban".

[29] The finding of the lack of credibility was based on inconsistencies, and not on a lack of corroboration as shown above. Therefore, I find that the instance of misspeaking in the orally rendered decision was just that, and that the substance of the decision confirms that there was no reviewable error. I find in review of the decision that the RPD member, though he used the word "corroborating", in application found inconsistencies that led to credibility findings.

(2) Not a Member of the Madhiban

[30] The RPD member further provided reasons as to why he did not find the Applicant to be a member of the Madhiban clan. He notes that:

- the Applicant's father was in the military;
- his father (the Applicant's grandfather) was a camel shepherd (every year or so the owners would give him a camel);
- his family owned a house; and
- the Applicant attended school.
- [31] The evidence presented by the Applicant was not consistent with what the country condition documents describes are the socio-economic characteristics of the Madhiban. Although I agree with the Applicant that a person could be a member of the clan, and not fit into all the profile attributes listed in the country conditions. It would be for the Applicant to explain to the RPD member why in his case the "general" factors listed are not applicable.
- [32] The RPD member found that the Applicant provided no credible explanation or evidence as to why he could attend school and in this case two different public schools when the

documentary evidence said the clan could not attend school. Another inconsistency was that his father owned a home when the country conditions indicate that members of the Madhiban clan are not able to own property.

- The onus is on the Applicant to provide evidence. The RPD member disagreed with what the Applicant presented because the national documentation package "indicates that those things were simply not available to the Madhiban and are not available to the Madhiban in Somalia". The RPD member goes on to say he cannot see "...evidence of the sort of before and after scenario that the claimant suggested..." and then went on to describe the evidence in greater detail. The Applicant also argued that the RPD member erred by assuming everyone must follow the prevalent pattern. The evidence is set out below at paragraphs 41-43 as it relates to and overlaps another of the Applicant's issues.
- [34] I note that the RPD member did not make his decision based on just one factor not being met rather the member indicated several factors not being met. I see no error in the RPD member's assessment that the Applicant is likely not a member of the Madhiban clan.

(3) Somalia-Somaliland

- [35] The RPD member found that the Applicant would be unlikely to face risk if returned to Somalia because:
 - His mother and other family members have in recent years been in Somalia for significant periods of time, and there is no evidence that they have been targeted, despite spending significant time in "Western countries"; and

- The country condition information demonstrates that there is generalized, but not specific risk, to the Applicant from Al-Shabaab or as a returnee.
- [36] The Applicant submits that the RPD member misread the country condition information in coming to the above conclusion. The Applicant argues that there was a reviewable error when the RPD member relied on and used the Somaliland National Human Rights Commission, rather than documentary evidence concerning Somalia.
- [37] The Applicant argues that RPD member relies on reports specific to Somaliland, which is not Somalia. The Applicant states that Somaliland functions as its own country, so it was unreasonable to rely on documentary evidence referring to Somaliland. The Applicant's position is that the RPD member did not afford the Applicant proper procedural fairness by giving the oral decision. The Applicant proposes that if the RPD member had taken his time, re-read everything after the hearing, and not given an oral decision, it would have been clear to him that he could not rely on the documentary evidence regarding Somaliland when the Applicant was from Somalia.
- [38] In my assessment, firstly, Somaliland is not a recognized country. The Applicant at the hearing conceded that while it may function as a country, international law did not recognize Somaliland as a country. Clearly, the documentary evidence is related to Somalia as a whole, though in some of the evidence it does discuss the different territories, one of which is Somaliland.

- [39] The document referred to in the decision is Response to Information Request (RTI) 13:13 ["RTI"]. The RTI confirms that the Gabooye clan that the Applicant alleges to belong to is located in Somaliland, as well as other territories in Somalia. The RTI deals with the Gabooye clan throughout Somalia and it seems that the treatment of the clan throughout Somalia, which included Somaliland, is relatively the same, with a few nuances as there are in all the territories.
- [40] The fact that the RPD member relied on the RTI, which in turn relied on a specific report called from the Somaliland National Human Rights Commission report, is not an error. It is not an error as the clan is located throughout the region and the report speaks of minor differences and the similarities of treatment throughout Somalia. Nothing that the Applicant presented as his risk profile is shown to be of any difference if he was a Madhiban in Somaliland or Somalia. The RTI states:

[a]ccording to the Secretary of the Gabooye Organization, the Gabooye are primarily located in the north of Somalia [Somaliland], although some reside in Mogadishu (6 Nov 2012). The ACCORD report indicates that the Gabooye and its subgroups are found in the north of the country and are also "scattered in Southern Somalia" (Dec. 2009, 15). The MRG states that the occupational groups are located throughout Somalia and are the principal minority in Somaliland (Oct. 2010, 12). However, it notes that due to conflict and the loss of traditional livelihoods, many occupational minorities have relocated to urban areas or camps for internally displaced persons (IDP) as well... According to the secretary of the Gabooye Organization the majority of Gabooye are not permitted to go to school with other Somali children (6 Nov 2012). This statement is corroborated by the Somaliland National Human Rights Commission...

[41] Further, the transcript shows that during the hearing, counsel did not bring up what they now argue is an error, in that the RPD member relied on country condition documentation related to Somaliland concerning the Madhiban.

- (4) Country Conditions and Madhiban Membership
- [42] The Applicant's testimony in response to the documentary evidence was that the Madhiban used to historically own property, but that the Madhiban would not have any legal documentation to support the property claim. The Applicant indicated that he still has a home in the neighbourhood of Hodan, Somalia, that people are currently using, but the Applicant is not getting payments for those people to use it. He feared that if he goes back to Somalia those individuals will assume he is going to sell the house or take it over, and they might kill him because of that.
- [43] In the decision, the evidence put forward by the Applicant was weighed against the documentary evidence by the RPD member:

When I look at the documentation I have in the National Documentation Package about the Madhiban, I don't see that clear distinction of things having been better before and now being bad. My reading of the information I have about the Madhiban is that these are long-standing cultural traditions within Somalia of discrimination and exclusion of the Madhiban...

... Let me just explain that in a little bit more detail. With respect to property ownership, as I mentioned to the claimant towards the end before the break, according to item 13:13, there's a quote there from a particular report, saying that the occupational castes, of which the Madhiban are one- The occupational castes are traditionally forbidden from owning land and livestock and participating in local business, the market economy or politics.

It describes the Gabooye, and I'm probably mispronouncing these, of which the Madhiban are a sub group, as an occupation caste defined by their traditional professions, traditionally bondsmen of the pastoralist majority clan groups. So the majority clan groups are the ones with the livestock, the ones who engage in herding traditionally. The occupational castes, like the Madhiban, are not allowed to do that and are instead limited to traditional professions.

It says, "members of minority clans can only work in the most undesirable jobs". This is from the Somaliland National Human Rights Commission.

"They can only obtain jobs as street sweepers or janitors, shoemaker or shoe mender, shoe polishing, blacksmith, potter and circumcision practitioner. These are low-paying jobs and with an income from these mobs they cannot afford to live a decent life."

..

This is still from the same document, Item 13.13. It says:

"The majority of Gabooye are not permitted to go to school with other Somali children. That's corroborated by the Somaliland National Human Rights Commission, which states that minority children do not go to school because they cannot afford the fees and they fear mistreatment by other children."

Another organization also indicates that:

Poverty and far of discrimination and segregation prevents minority children from going to school. Minority group members live in substandard accommodation in slums and lack access to sanitation facilities and services such as garbage collection and latrines.

. . . .

All of this is quite distinct from what the claimant has described as his family situation up until the time they had to leave Somalia in 1991. And again, it's worth emphasizing that the quote I started with about the occupational castes being traditionally forbidden from owning land. That's reference to tradition. That's not saying now, currently, they can't, but before they could.

[44] The RPD member had evidence to support his findings as evidenced from the quotes from the transcript above. I have found no error that the RPD member relied on documentary

evidence related to the Gabooye. Additionally, there was further documentary evidence to support the finding that the Applicant was not a member of the Madhiban clan.

(5) Oral Decision

- [45] The Applicant argued that it was an error to give an oral decision in this situation. I do not agree that on these facts and in other RPD hearings that a RPD member must reserve his or her decision, and cannot give an oral decision.
- [46] In fact, oral decisions are entirely appropriate for the RPD to issue, and providing the Applicant with a timely decision would seem to meet all the requirement of the legislation and procedural fairness. In *Soliman v Canada (Citizenship and Immigration)*, 2007 FC 162, Justice Noël noted at paragraph 17, that oral decisions of the RPD are not in and of themselves problematic.
- [47] Early in the hearing the RPD member set out exactly how the matter would proceed, including that the decision would be rendered at the end of the hearing, if the hearing did not run long:

So the way the hearing will go today is I'll have some questions for you first and then depending how things go, your counsel may also wish to ask you some questions and I may hear what she has to say about your case, any arguments that she wishes to make for me to consider.

Hopefully, we'll be able to conclude all of that and I'll be able to give you my decision and reasons for it today but if things take a bit longer I may not have time to give you my decision and the reasons today in which case I would have to send them to you later in the mail. Okay?

So we'll see how things go. We will take a break partway through the afternoon, certainly but at any moment if any of you need a break for whatever reason, please don't hesitate to let me know and I can try to accommodate that.

[48] At the end of the hearing, the RPD member said:

What I'd like to do now is take a half hour break. I'd like to consider everything that I've heard and what's on the file and see if I can come to a decision today, because I know you've been waiting and I don't want to have to keep you waiting if I can give you a decision today. So I'll take that time to look everything over and see if I can give you a Decision and Reasons. I think I probably need about 25 minutes. If we could come back at quarter to the hour, hopefully I'll be in a position to let you know my decision then. Thank you.

- [49] I find that the RPD member was very considerate and indicated that he would take the time to review the material. I do not find any procedural unfairness and find that the decision rendered orally was reasonable.
- [50] Further, at the time of the hearing, when this was mentioned, the Applicant's counsel did not register any protest at that time, or after. I do not agree with the Applicant's assessment that if the RPD member had taken more time, and not given an oral decision, that the decision maker would, on further reflection, done anything differently.
 - (6) Lack of Appeal
- [51] The Applicant argues that the RPD was unreasonable by erring in its assertion that there was a statutory option of appeal from the decision.

- [52] The Applicant extended this argument to include that the jurisprudence of the Supreme Court and this Court has held that an applicant without the option of an appeal should have more generous procedural protections. In particular, the Applicant submits that the RPD member should have reserved his decision.
- [53] The Applicant relies on a number of cases to support this proposition. In *Arsenault v Canada (Attorney General)*, 2016 FCA 179, Justice Scott, writing for the Court, was examining an application for judicial review to set aside a decision by an adjudicator of the Public Service Labour Relations Board. In agreeing with the applicants in their decision, the Court of Appeal noted that the applicants refer to the principle that, "the absence of a right to appeal calls for more generous procedural protections" (para 17).
- [54] The Applicant concedes that the scope of introducing new evidence on judicial review is heavily limited by section 110(4) of the *IRPA*, which only allows for new evidence to be submitted under very narrow circumstances.
- [55] Curiously, the Applicant states that there is no desire to add new documentary evidence. Rather, the Applicant argues that the above (more colloquially put) demonstrates that the RPD member was essentially asleep at the wheel when he issued his decision on the same day of the hearing. In the Applicant's words, "[h]e manifested an attitude that whatever errors was making [sic], if indeed he was making any, could be corrected on appeal".

- I do not agree with this proposition. As correctly noted by the Respondent, while it is true that procedural fairness should be generously construed when there is no right of appeal from a decision and the implications of the hearing for the applicant are serious, there is no authority that the Applicant can point towards to hold that applicants before the RPD are entitled to have the decision reserved as a matter of procedural fairness. Since the Applicant cannot establish this principle, and since the Applicant argued that further evidence would not have been put forward to the RAD in any case, there has been no identifiable breach of procedural fairness.
- [57] While I agree with the Applicant that the RPD member erred, the error must be one that, had the error not been committed, the RPD could have reached a different result. This reflects the holding in *Tran v Canada* (*Citizenship and Immigration*), 2018 FC 210 [*Tran*], in citing paragraph 24 in *Castillo Mendoza v Canada* (*Citizenship and Immigration*), 2010 FC 648 Justice Grammond held that, "[a] decision is still reasonable if it contains an error that would not have changed the outcome" (para 13 of *Tran*).
- [58] Looking to the precise wording of the RPD member's decision to obtain further clarity on whether his error goes to the heart of the matter.
- [59] On page 1 of the oral reasons, the RPD member notes:

I'm saying no to your claim and I'm sorry about that. I'll explain why. But before I get into that explanation, I also want to remind you that you have the right to appeal my decision. So, this decision that I'm making today isn't the final word about your situation in Canada. You can appeal it: and it may very well be that I've made a mistake here and perhaps the Appeal Division will see things differently than I have today. So, I wish you good luck in that. But

I have to make my decision based on the information 1 have in front of me and I'll explain now how I've reached this decision.

[Emphasis added]

[60] On page 8 of the decision, the RPD member notes:

So, there just isn't a reflection in this material of a significant change of circumstances from before the civil war in Somalia. And, you know, that may be something that can be remedied with additional documentary evidence at the appeal level. But I don't have that information before me today. What I have is information suggesting that traditionally, historically, culturally, the Madhiban have been excluded and very severely limited in terms of the types of work they are able to perform, their access to education, excluded from property ownership. And that simply doesn't fit with the claimant's description of the family's circumstances in Somalia.

[Emphasis added]

- [61] As the Respondent notes, the entire reasoning of the RPD member is based on a comparison of the objective country condition documentation and its inconsistency with the Applicant's narrative of life in Somalia in the past. The Applicant is to put their best foot forward at the RPD hearing and even if there was an appeal, the provision of new evidence is in limited circumstances (*Canada* (*Citizenship and Immigration*) v Singh, [2016] 4 FCR 230, 2016 FCA 96).
- [62] The decision was based on a lack of credibility. An error by the RPD member in elucidating the available steps after the negative RPD decision does not render the decision unreasonable. In this case, the mistaken belief that there was an appeal does not make the decision unreasonable.

- [63] I will dismiss this application.
- [64] No question for certification was presented and none arose.

JUDGMENT in IMM-2361-18

THIS COURT'S JUDGMENT is that:

- 1. The Application is dismissed; and
- 2. No question is certified.

_____"Glennys L. McVeigh"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE: YUSUF OMAR MOHAMED v THE MINISTER OF

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