

Federal Court



Cour fédérale

Date: 20191010

Docket: IMM-5563-18

Citation: 2019 FC 1280

Toronto, Ontario, October 10, 2019

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

AHMED BARRE FARAH

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

(Delivered from the bench at Toronto, Ontario, on October 1, 2019)

[1] The present Application concerns a refugee claim made by the Applicant, a citizen of Somalia. The decision under review is that of the Refugee Appeal Division (RAD), dated October 12, 2018, on appeal from a decision from the Refugee Protection Division (RPD) rejecting the claim, dated October 6, 2017.

[2] The RAD summarized the Applicant's claim as follows:

The Appellant alleges that he is a citizen of Somalia and is a member of the Marehan clan. The Appellant operated a shop which sold goods to police and government employees. Fighting broke out between the police and Al-Shabaab in the area. In March 2017, the Appellant received threats from Al-Shabaab for selling goods to government employees and the police, and was accused of being a spy for them.

On 21 March 2017, the Appellant's brother, who also worked at the Appellant's shop, was killed by members of Al-Shabaab. The Appellant and his wife then fled Somalia, travelling to Nairobi, Kenya on 2 April 2017.

The Appellant, using an agent, then fled to Canada, arriving on 6 May 2017 while his wife remained in Kenya. The Appellant made his refugee claim, which was refused by the RPD on the grounds that he had not established his identity, and that his account of what had happened to him in Somalia was found not to be credible.

(CTR at pages 7-8)

[3] In its decision, the RPD found on several issues that the Applicant was not able to provide satisfactory evidence on identity. The RPD made speculative implausibility findings on each of these issues, phrased for example as follows:

...The panel does not accept that someone such as the claimant who has spent 44 years of their life in the area would not be able to provide a general estimate of the number of people living in the area and the distance between his village and other major cities and borders. The panel draws a negative credibility inference.

...The panel does not accept the claimant's evidence with respect to obtaining his SIM card without a national identity card as credible. Further, the panel does not accept that the claimant would not know if the Somali government is issuing identity documents if he has been living there his entire life up until April of 2017. The panel draws a negative credibility inference.

(CTR at paras 17 and 28) [Emphasis added]

[4] On appeal to the RAD, the Applicant argued that the RPD erred in finding the Applicant's identity evidence was not credible, erred by assessing the merits of the claim after

finding the Applicant's identity evidence was not credible, and erred in rejecting the risk faced by the Applicant from Al-Shabaab (CTR at page 65). The Applicant also submitted three pieces of new evidence described in the arguments advanced to the RAD as follows:

In the case at bar, the Appellant tenders as new evidence an affidavit from Abdullahi Mohamed Adam. The witness confirms the personal, national and clan identities of the Appellant and how he knows him. The witness lives in Edmonton, Alberta and came to Toronto on December 13, 2017 to visit his son. On December 14, 2017, he went to a Somali restaurant, Hamdi, to have lunch and saw the Appellant there. The witness returns to Edmonton on December 31, 2017. He has provided his Alberta driver's license and air tickets confirming his travel. The Appellant looked for the witness in Toronto but was not able to find him prior to his hearing. As such, the affidavit was not reasonably available and should be admitted as new evidence.

The Appellant tenders as new evidence a letter from the Government office of the Garbahaaray District. The manager of the district confirms the national and personal identity of the Appellant. He also confirms that the Appellant was a herder who sold animals and then opened a store. He confirms that the Appellant was accused of being a government spy by Al-Shabaab and that they killed his brother. The Appellant had made requests for this letter but had not been able to obtain it prior to his hearing due to delays in responding from the government office. This was not within the control of the Appellant. Therefore the letter was not reasonably available prior to the hearing and should be admitted as new evidence.

The Appellant tenders as new evidence a letter from the electronics store where he purchased his cell phone and SIM card. The letter confirms that purchasers of cell phones, SIM cards and air minutes can buy these products without having to produce identity documents. The shop owner also attached photos of the outside and inside of his shop showing a sign with the shop name. The Appellant could not anticipate that his ability to purchase a cell phone without producing an identity card would become an issue at his hearing and would result in a negative credibility finding. Therefore, he could not request this letter in advance. As a result, the letter and photos should be admitted as new evidence as they were not reasonably available prior to the hearing.

(CTR at pages 66-67) [In-text citations omitted] [Emphasis added]

[5] In its decision, without a description as to why, the RAD decided that the determinative issue was credibility, not identity – despite the fact that the RPD had focused on identity. As the Applicant argued on judicial review, the RAD inappropriately “moved the goalposts” of the appeal.

[6] The RAD changed the determinative issue to credibility without notifying the Applicant of this change and giving him a chance to make substantive arguments on that issue. Indeed, in breach of a duty of fairness to the Applicant, the RAD failed to give him an opportunity to respond.

[7] In addition, the RAD found that the new evidence before it related to identity and did not relate to the issue of credibility. Therefore, the RAD found the new evidence irrelevant and inadmissible.

[8] I find that the RAD did not sufficiently consider the Applicant’s arguments, in particular, his arguments on the new evidence. The new evidence contained cogent evidence on the issues of identity and credibility. The letter from the Government office of the Garbahaaray District addressed the risk the Applicant faced from Al-Shabaab. The letter from the electronics store directly responded to the RPD’s speculative implausibility finding that the Applicant could not buy a SIM card without an identity document.

[9] For these reasons, I find that the RAD made reviewable errors that render the decision unreasonable.

JUDGMENT IN IMM-5563-18

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back for determination by a different Member.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5563-18

STYLE OF CAUSE: AHMED BARRE FARAH v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 1, 2019

JUDGMENT AND REASONS: CAMPBELL J.

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