

Federal Court



Cour fédérale

Date: 20200409

Docket: IMM-4193-19

Citation: 2020 FC 507

Ottawa, Ontario, April 9, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

IRSHAD MOHAMED AHMED

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of a Minister’s Delegate (the “Delegate”) that found the Applicant constituted a danger to the public pursuant to subsection 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“*IRPA*”). Given his lengthy criminal record and serious offences, the Applicant was ordered to be removed to Somalia.

[2] The Applicant seeks judicial review of the Risk Assessment aspect of the Delegate's decision, on the grounds that the Delegate erred by (1) failing to consider an expert's report, which provides evidence that he is at risk throughout Somalia; (2) finding that Mogadishu was an Internal Flight Alternative ("IFA"), but failing to conduct an IFA assessment; and (3) unreasonably assessing the humanitarian and compassionate ("H&C") factors in this matter.

[3] For the following reasons, the Delegate's decision is unreasonable. This application for judicial review is allowed.

II. **Facts**

A. *The Applicant*

[4] Mr. Irshad Mohamed Ahmed (the "Applicant") is a 37-year-old citizen of Somalia. In February 1990, the Applicant came to Canada as a 7-year-old child from Mogadishu, Somalia with his mother, Ms. Madina Basseyy, and his siblings. The family was fleeing from Mogadishu as security forces had killed Ms. Basseyy's father, mother, and uncle for supporting the United Somali Congress. In 1992, the Applicant and his family's refugee claims were accepted, and on September 21, 1995, they obtained permanent residency in Canada.

[5] In 2005, after amassing an extensive criminal record, the Applicant was ordered to be deported from Canada. In 2010, a Minister's Delegate decided that the Applicant had been rehabilitated, and consequently issued a warning letter instead of a danger opinion. However, after further convictions for serious criminal offences, including the possession of a firearm for

the purpose of trafficking, the Minister's Delegate commenced a new procedure under subsection 115(2) of the *IRPA*. In 2017, the Minister's Delegate decided that the Applicant was a danger to the public and that he would not be at risk if he were to return to Somalia ("First Decision").

[6] The Applicant successfully sought judicial review of the First Decision in *Ahmed v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 471 (CanLII), as the Court overturned the decision on the basis that the Minister's Delegate had breached the principles of procedural fairness. The matter was sent back for redetermination only on the Risk Analysis, as the Applicant had not challenged the Danger Analysis finding.

B. *Decision Under Review*

[7] By decision dated June 17, 2019, the Delegate found that the Applicant may be removed pursuant to subsection 115(2)(a) of the *IRPA*. The Delegate considered the risk that the Applicant would face given his profile as a westernised young man who had lived outside Somalia since childhood and had no supports in Somalia. Ultimately, after considering the H&C grounds and the possible risks that the Applicant might face if returned to Somalia, the Delegate found that the need to protect members of the Canadian public weighed in favour of the Applicant's removal from Canada.

[8] The Delegate also found that the Applicant's removal would not "shock the conscience of Canadians", and found that his removal to Somalia would not, on a balance of probabilities,

violate his rights under section 7 of the *Charter* (*The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11) (the “*Charter*”).

(1) **Country Conditions**

[9] In assessing the general country conditions in Somalia and the threat from Al Shabaab and IS-Somalia, the Delegate noted that Somalia has been in civil conflict since 1990, is generally considered to be a failed state, and faces cyclical drought. The Delegate acknowledged that while the Somali Federal Government has nominal control over Mogadishu—which it liberated from Al Shabaab’s control in 2015—it has little to no control over rural areas, many of which are still controlled by Al Shabaab. The UK Home Office’s Country Policy Information Note from July 2017 states, “Ordinary civilians living in an area controlled by the government/AMISOM are unlikely to be targeted by Al Shabaab”.

[10] While the Delegate acknowledged that the expert report provided by the Applicant states that IS-Somalia has “dramatically increased its presence [...] in and around Mogadishu,” the Delegate also pointed out that the report did not provide references for this information. While the areas outside Mogadishu are controlled by Al Shabaab, the Delegate found that there was insufficient evidence to conclude that the Applicant would need to leave Mogadishu. Based on the fact that members of the Somali diaspora were returning to Somalia, the Delegate concluded that this illustrated a measure of safety in Somalia. Overall, the Delegate found that, on a balance of probabilities, the Applicant would not personally face a risk to life, liberty or security of the person under section 7 of the *Charter*.

(2) **H&C Considerations**

[11] In assessing H&C considerations, the Delegate acknowledged that the Applicant has lived exclusively in Canada since the age of 7, the Applicant's family resides in Canada, the Applicant has no family members in Somalia, and that he has only a basic understanding of the Somali language. Given the Applicant's lengthy absence from Somalia and his lack of familiarity with the Somali culture, the Delegate noted that the Applicant's reintegration into life in Mogadishu would be difficult. Although the Delegate recognized that the Applicant may face some difficulties in finding housing and employment, the Delegate found that the Applicant had greater flexibility in his search for accommodation as an adult male without any dependants, and that his family could provide financial assistance until the Applicant finds employment.

[12] The Delegate noted that the Applicant is married to a Canadian citizen, Ms. Chhoeum Chea. While the Applicant has no children of his own, he is a step-father to his wife's two children—Keo and Taia—and a father figure for Ms. Chea's late sister's three children. Regarding the best interests of the children ("BIOC"), the Delegate found that the Applicant had been in detention since 2011, and that his presence in the children's lives had been minimal. Moreover, the Delegate found that Ms. Chea had been the principal care provider for the children, and that there was insufficient evidence to conclude that the status quo would change in the event of the Applicant's removal from Canada.

[13] Notably, in the Delegate's view, the Applicant continued to be a dangerous person who had committed serious crimes and had not demonstrated that he was engaged in a rehabilitation

plan or that he was committed to changing his behaviour. As a result of his prolonged absence due to incarceration, the Applicant had been absent from the children's lives for almost eight years, and the Delegate found that the Applicant had not been a good role model for the children. Overall, the Delegate noted that the Applicant was heavily involved in the criminal subculture, and found that the H&C considerations did not outweigh the danger posed by the Applicant to the public.

III. Issues and Standard of Review

[14] In my view, the following issues arise on this application for judicial review:

- A. Did the Delegate err in the treatment of the expert report?
- B. Is the Delegate's analysis on H&C considerations reasonable?

[15] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard applied to the review of a decision by a Minister's Delegate made pursuant to section 115 of the *IRPA*: *Mworosha v Canada (Citizenship and Immigration)*, 2017 FC 983 (CanLII) at para 20; *Omar v Canada (Citizenship and Immigration)*, 2013 FC 231 at para 33; *Reynosa v Canada (Citizenship and Immigration)*, 2016 FC 1058 at para 11. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[16] As noted by the majority in *Vavilov*, “a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker,” (*Vavilov* at para 85). Furthermore, “the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency,” (*Vavilov* at para 100).

IV. Analysis

A. *Did the Delegate err in the treatment of the expert report?*

[17] The Applicant submits that the Delegate erred in the treatment of the expert report provided by the Applicant, by ignoring portions of the report, and misconstruing the evidence as a whole. The expert report was submitted by Christopher Anzalone, a research fellow at Harvard University and the author of more than fifty articles and other publications on Somalia’s Al Shabaab, Al-Qaeda, and Islamic extremism. The Applicant submits that the Delegate did not appear to take issue with Mr. Anzalone’s expertise, by noting that he was an academic with “some expertise in Somalia country conditions”.

[18] The Applicant argues that Mr. Anzalone produced an extensive report on his consideration of the risks to be faced by the Applicant if returned to Somalia, after reviewing the Applicant’s circumstances and the present conditions in Somalia. However, the Applicant submits that the Delegate unreasonably rejected the expert report. Instead, the Delegate cited a 2017 report from the UK Home Office, and concluded that the profiles of those targeted by Al

Shabaab included: high-profile members of an institution representing the international community or the Somali government, supporters of the Somali government, members of non-governmental organizations, journalists, and government collaborators. In the Applicant's view, the Delegate failed to explain why—given the evidence in the expert report—the Applicant would not be at risk in Mogadishu. The Applicant also argues that the Delegate failed to properly consider the expert report, which stated that the Applicant would be at risk given the various factors and personal circumstances.

[19] The Applicant submits that the Delegate's approach to the expert report demonstrates a reviewable error, and relies on *Lecaliaj v Canada (Citizenship and Immigration)*, 2009 FC 123 (CanLII) at para 55 [*Lecaliaj*], where this Court stated that the Board had a duty to address conflicting evidence from an expert's report that contradicted the Board's conclusions. The Applicant also cites *Soe v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 557 (CanLII) [*Soe*] at para 99, where the Court held that while administrative decision-makers have the discretion to determine the weight attached to expert evidence, the "decision maker must provide a valid reason for rejecting or discounting the opinions."

[20] The Respondent submits that in the context of a risk assessment under section 115 of the *IRPA*, the question is whether the individual concerned has established that it is more likely than not that they will face a risk to life, liberty, or security if returned to their country of citizenship. In light of this, the Respondent submits that the Delegate properly considered the expert report and accepted some information contained therein. However, in the face of additional contrary information, the Respondent argues that the Delegate was entitled to rely on other country

documentation, and to assign weight to the evidence. The Respondent maintains that the Delegate relied on other credible country documentation as the basis for the conclusion that the Applicant faced a low risk in Mogadishu.

[21] In my view, the Delegate erred in its treatment of the expert report. There is no doubt that the Delegate clearly recognized that Mr. Anzalone was an academic expert with “some expertise in Somalia country conditions.” However, given this recognition, there was very little engagement with the expert report, even where the Delegate formed conclusions that contradicted conflicting evidence from the expert report (See *Lecaliaj*, above).

[22] Mr. Anzalone had opined that there was “a special constellation of risks” for the Applicant, as a returnee from a “Western” country who lacked strong family and clan ties. Mr. Anzalone explained in his report that Al Shabaab has been particularly suspicious of spies planted by Western governments in Mogadishu and other cities, due to recent U.S. Special Forces attacks and drone attacks. Mr. Anzalone also stated that Al Shabaab has an extensive network of strong intelligence gathering in and outside of Mogadishu. Despite this discussion on civilians being targeted as “western spies”, the Delegate concluded that the Applicant—as a civilian—would not fall into the profiles of those targeted by Al Shabaab, by relying on older country documentation (the 2017 UK Home Office report).

[23] The Delegate also stated that, “there is insufficient information in the objective documentary evidence to lead me to conclude that civilians in areas not under Al Shabaab control are likely to be perceived as any of the above simply because they are returnees from

Western countries.” There is no reference to the evidence provided in the expert report concerning country condition evidence and the particular constellation of risks that would accompany the Applicant upon his return to Somalia. The only instance where the expert report is referenced is where the Delegate notes that the report “does not provide a reference” for the information that IS-Somalia has “dramatically increased its presence [...] in and around Mogadishu”.

[24] Given the Delegate’s recognition of Mr. Anzalone as an expert in his field, the Delegate had a duty to address conflicting evidence from the expert’s report that contradicted the Board’s conclusions. In other words, the Delegate was obligated to provide reasons why the expert report’s conclusion that the Applicant would carry a “special constellation of risk”—due to the perception as a western spy—should be given little or no weight, given the Delegate’s contradictory conclusion that civilians would not be at risk in Mogadishu.

B. *Is the Delegate’s analysis on H&C considerations reasonable?*

[25] Under subsection 115(2) of the *IRPA*, the Delegate must determine whether returning the Applicant to Somalia would shock the conscience of Canadians as to engage in interests of life, liberty and security of the person and thereby violate section 7 of the *Charter* (See *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 SCR 3).

[26] The Applicant submits that it would shock the conscience of Canadians to forcibly remove him to Somalia, a country that he left at age 7, a country in which he cannot fluently converse and in which he has no family members, a country in which there is widespread

drought and food insecurity. The Applicant concedes that he has a serious criminal record. However, the Applicant submits that he was only 7 years old when he came to Canada, and that he was certainly not a criminal when he came. As such, in the Applicant's view, he is a product of Canadian society. The Applicant argues that sending him back to a country of war and famine without any support would shock the conscience of Canadians, and thus violate section 7 of the *Charter*.

[27] The Respondent submits that a review of the Delegate's decision on balancing the danger posed by the Applicant to the public with the humanitarian or risk factors that may apply requires significant deference (*Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153 (CanLII) at para 33; *Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151 (CanLII) at para 15). The Respondent submits that only humanitarian factors were being weighed against the risk that the Applicant posed to the public, because the Delegate had determined that the Applicant would not face a risk to life, liberty or security of the person.

[28] In light of the Applicant's serious criminal record, the Respondent argues that the Applicant needed to show a very high level of humanitarian factors before the balance would "shock the conscience of Canadians". The Respondent rejects the Applicant's submission that he should remain in Canada because he is "a product of Canadian society". The Respondent submits that the rest of the Applicant's family became well-established in Canada with professional careers, and that none have a criminal record.

[29] In my view, the Delegate's assessment on H&C factors was unreasonable. Although the Delegate listed the H&C considerations, the analysis was superficial and demonstrated a "failure to grapple with the consequences" of removal to the Applicant (*Vavilov* at para 134). As the Applicant came to Canada as a child at the age of 7, the Applicant lacks an understanding of the Somali language and culture, does not have family members in Somalia, and has absolutely no support in Somalia that could assist in his reintegration. The Applicant's life and reintegration in Somalia will not only be "difficult" as described by the Delegate, but nearly insurmountable.

[30] However, the Delegate simply noted that it would take "some time" for the Applicant to "regain fluency in his mother tongue", that the Applicant would have a "greater flexibility" in his search for accommodation as an adult male without any dependants, and that he could receive financial assistance until the Applicant could find employment. Despite having "flexibility" in the type of accommodation, how is the Applicant to find an accommodation in the first place without being able to speak the language? How will the Applicant be able to find employment with only a basic understanding of the language? How will the Applicant learn the language without a support system in Somalia? In my view, the Delegate's H&C analysis severely overlooked the difficulties in the Applicant's reintegration given the restrictions due to his lack of language abilities and familiarity with the culture, and can only be described to have been a superficial exercise of humanitarian considerations.

[31] I recognize that the H&C considerations were to be balanced against the danger that the Applicant posed to the Canadian public, but for the considerations to be balanced, they first had

to be properly assessed and analyzed. I find that the Delegate's analysis on the H&C considerations is unreasonable.

V. **Certified Question**

[32] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VI. **Conclusion**

[33] The Delegate's decision is unreasonable, as it erred in its treatment of the expert report and failed to properly assess the H&C considerations. Therefore, this application for judicial review is granted.

JUDGMENT in IMM-4193-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter is to be returned for redetermination by a different decision-maker.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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