

Federal Court



Cour fédérale

Date: 20151103

Docket: IMM-412-15

Citation: 2015 FC 1231

Fredericton, New-Brunswick, November 3, 2015

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

KASSIM MOHAMED ALI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction and Overview

[1] Kassim Mohamed Ali seeks judicial review of a decision of the Refugee Appeal Division [RAD] in which it (RAD) dismissed an appeal from the Refugee Protection Division's [RPD] determination that Mr. Ali is neither a Convention refugee as contemplated by s 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], nor is he a person in need of protection as contemplated by s 97(1) of the Act.

[2] For the reasons set out herein, I would dismiss the application for judicial review.

II. Relevant Facts

[3] Mr. Ali is a citizen of Somalia, born on January 1, 1985. In March 2013, he travelled to Ethiopia and arrived in Canada in September 2013. Mr. Ali is Muslim by faith (Islam Sunni) and a member of the Shanshee sub-clan of the Reer Hamar. Before the RPD, Mr. Ali testified that in Somalia, he and his family owned and operated a farm where they raised livestock, including cows and sheep, and owned and operated a shop where they sold food, teas, cigarettes and candy.

[4] Mr. Ali claims that by reason of his hidden relationship with an unmarried woman who became pregnant, he fears revenge from her family and persecution from Al-Shabaab, as his actions are considered to be 'against Islam'. The record does not disclose when the relationship occurred, the age of the parties at the time of the relationship, or their age at the approximate date of conception. I understand the pregnancy was terminated prior to the birth of the child. Mr. Ali further claims that, as a member of a minority clan, he does not have protection from persecution should he return to Somalia.

III. Impugned Decision

[5] The RPD accepted that Mr. Ali is a national of Somalia. However, it concluded that he failed to provide persuasive evidence supporting an objective fear of persecution or corroborating his subjective fear that Al-Shabaab or his ex-girlfriend's family are seeking him out, and intending to inflict harm upon him. The RPD further found that Mr. Ali failed to prove

that he or his family experienced threats or acts of violence, as members of the Reer Hamar clan. The RPD concluded that Mr. Ali did not present persuasive objective evidence supporting his fear of returning to Somalia.

[6] Mr. Ali appealed this finding to the RAD. He raised three issues: first, that the RPD did not apply the proper legal test for a s 96 determination; second, that as a displaced person who is also a member of a minority clan, he has no protection and could be robbed, killed, or forced to fight for an Islamic group; and finally, that his relationship with an unmarried woman, which resulted in a pregnancy, could lead to revenge killing by her family or revenge for his anti-Islamic conduct by Al Shabaab.

[7] With respect to the first issue, the RAD concluded the RPD improperly applied s 96 of the Act when it (the RPD) stated that Mr. Ali did not “provide persuasive evidence that, should he return to Somalia, he would face problems as a member of the Reer Hamar” [My emphasis.]. The test clearly is not whether Mr. Ali would ‘face problems’. The RAD articulated the proper legal test as being whether there is a ‘serious possibility’ of persecution due to Mr. Ali’s membership in a minority clan should he return to Somalia. The RAD then considered the jurisprudence of this Court, documentary evidence such as the United Nations High Commission on Refugees Handbook [UNHCR Handbook], and Mr. Ali’s testimony before the RPD, to conclude he (Mr. Ali) did not face a serious possibility of persecution, based upon clan membership.

[8] With respect to the second issue, the RAD found that Mr. Ali's statements regarding fear of persecution due to his membership in a minority clan and as a displaced person were speculative and that the documentary evidence contradicts his assertions. It found that Mr. Ali did not present objective evidence to support his statement that Al-Shabaab targets individuals with a profile similar to his.

[9] Finally, the RAD found that Mr. Ali did not show he is more likely than not to face a risk of harm from his ex-girlfriend's family as contemplated by s 97(1). The RAD reached a similar conclusion with respect to a risk of harm from Al Shabaab or others in the Islamic community.

IV. Issues

[10] Mr. Ali contends the RAD: (i) failed to apply the proper standard of review to the RPD's findings; (ii) erred by conflating its s 96 and s 97(1) analysis; (iii) failed to refer the matter to a differently constituted panel of the RPD for redetermination upon concluding the RPD erred in its interpretation of s 96; and (iv) rendered an unreasonable decision given a fulsome assessment of the evidentiary record.

V. Standard of Review

[11] The RAD's interpretation of the legal standard encompassed by each of sections 96 and 97 of the Act relate to questions of law of general application and is to be assessed on the correctness standard (see *Vozkova v Canada (Minister of Citizenship and Immigration)*, 2011 FC

1376, [2011] FCJ No 1682 at para 20; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, [1998] SCJ No 46).

[12] The RAD's decisions to deny Mr. Ali's claim to refugee status (s 96) or status as a person in need of protection (s 97) constitute questions of mixed fact and law, and are to be assessed on the reasonableness standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]). This Court will only intervene if it concludes the RAD's decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para 47).

VI. Relevant Provisions

[13] Attached hereto as Appendix 'A' is the definition of Convention refugee and person in need of protection, found in ss 96 and 97 of the Act, as well as s 111 of the Act.

VII. Analysis

A. *Standard of review applied by the RAD*

[14] The case law is somewhat divided on the scope of review that should be applied by the RAD with respect to the RPD's findings (*Taqadees v Canada (Minister of Citizenship and Immigration)*, 2015 FC 909, [2015] FCJ No 911 at para 11). However, the current trend in the jurisprudence holds that the RAD must independently assess the matter before it and substitute its own determination where it differs from the RPD's view (see *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, [2014] FCJ No 845 [*Huruglica*]; *Alyafi v Canada*

(*Minister of Citizenship and Immigration*), 2014 FC 952, [2014] FCJ No 989; and *Bahta v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1245, [2014] FCJ No 1278).

However, where there are questions of credibility, factual findings or other matters on which the RPD has a particular advantage (see *Huruglica*, above at paras 54-55; *Palden v Canada (Minister of Citizenship and Immigration)*, 2015 FC 787, [2015] FCJ No 816; and *Yetna v Canada (Minister of Citizenship and Immigration)*, 2014 FC 858, [2014] FCJ No 906) deference may be accorded to the RPD. The RAD followed the approach adopted in *Huruglica*, in which the RAD conducts a hybrid form of appeal which requires it to make its own determination based on an independent assessment of the evidence, but which allows it to afford deference to the RPD on certain issues.

[15] Mr. Ali submits the RAD failed to take a ‘fresh look’ and failed to conduct its own analysis of the evidence. With respect, I disagree. Although the RAD briefly referred to the RPD’s findings relating to Mr. Ali’s testimony, it also assessed the appeal based upon documentary evidence such as the UNHCR Handbook and country conditions. In my view, the RAD conducted its own analysis of the material before it, all the while showing deference to the RPD’s factual and credibility findings, where appropriate.

B. *Application of ss 96 and 97 of the Act*

[16] Mr. Ali contends the RAD, after concluding the RPD erred in its formulation of the legal test under s 96 of the Act, made the same error (incorrect formulation of the legal test) in paragraph 29 of its own reasons. In paragraph 29 the RAD states: “I do not have sufficient credible evidence that he was targeted or will be targeted by Al Shabaab or his ex-girlfriend’s

family upon return to Somalia” [My emphasis.]. Mr. Ali contends the use of the word ‘will’ demonstrates the RAD erred by failing to employ the phrase ‘serious possibility’ in assessing his (Mr. Ali’s) fear of persecution under s 96. The Respondent counters by asserting the impugned sentence was employed only to assess the evidence and was not intended to be a statement of the standard of proof applied by the RAD. The Respondent contends that a full reading of the decision demonstrates the RAD knew and applied the correct legal test. Notably, the Respondent refers to the fact that the RAD observed, at the beginning of its reasons, that the RPD failed to apply the correct test. Other portions of the RAD decision support the Respondent’s position. At paragraph 12 of its reasons the RAD states there is no ‘serious possibility’ of persecution should Mr. Ali return to Somalia. Further, in paragraph 21 the RAD states that Mr. Ali did not present sufficient credible evidence to establish a ‘serious possibility’ of persecution due to his membership in the minority clan. The RAD also refers to the test of ‘serious possibility’ of persecution at paragraph 23 of its reasons. Upon reading the RAD’s decision as a whole, I am of the view it was aware of, and properly applied, the legal test set out in s 96 of the Act (see *Alahaiyah v Canada (Minister of Citizenship and Immigration)*, 2015 FC 726, [2015] FCJ No 723 at paras 47-50).

[17] With respect to Mr. Ali’s relationship with an unmarried woman and the possible revenge killing by her family, the RAD considered the risk under s 97. Unlike s 96, s 97(1) does not require a nexus to a Convention ground but does require a claimant to establish an objective fear of persecution. Mr. Ali contends there is no practical difference between the burden of proof under s 96 and the burden under s 97. However, I am persuaded by the series of cases holding that the standard of proof under s 96 is somewhat less than that of a balance of probabilities

while that required of s 97 is the civil standard. See *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] FCJ No 1 at para 14 wherein this Court concluded the proper standard of proof for a s 97(1) determination is ‘on a balance of probabilities’ and *Canada (Minister of Citizenship and Immigration) v A011*, 2013 FC 580, [2013] FCJ No 685 at para 30 where this Court concluded that the burden of proof of personal risk under s 97(1) requires a higher standard than the test of ‘a serious possibility’ under s 96 see also *Santanilla Bonilla v Canada (Minister of Citizenship and Immigration)*, 2013 FC 656, [2013] FCJ No 724 at para 43 and *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, [1995] SCJ No 78 at para 120). I am satisfied the RAD was correct in applying a ‘balance of probabilities’ standard of proof to its s 97 analysis.

[18] Finally, Mr. Ali contends the RAD should have conducted a separate analysis under s 97. While such an approach is preferable, and clearly was not undertaken in this case, I disagree with Mr. Ali that the failure to have done so constitutes ‘reviewable error’. I would first note that in my view the concept of ‘reviewable error’ is now subsumed in the test of reasonableness. Let me explain. The pre-*Dunsmuir* approach taken by this Court was to determine whether the decision-maker’s failure to conduct a separate analysis under s 97 amounts to an irrelevant error or one that is “reviewable”. This determination was to be made based upon the facts of each case (*Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, [2003] FCJ No 1540; *Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, [2005] FCJ No 275).

[19] In my view, the advent of *Dunsmuir* calls for a new approach. No longer is the Court to consider whether one particular error is “irrelevant” or “reviewable” but rather; whether based upon the deference doctrine, the decision as a whole meets the test of reasonableness. Accordingly, the RAD’s analysis under s 97 will stand if the decision-making process is justified, transparent and intelligible, and if it falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, above at para 47). Whether a decision-maker decides to deal separately with a claim under s 97 is to be afforded deference, given his or her specialized expertise and the particular nature of the issues (*Velez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 923, [2010] FCJ No 1138 at paras 23, 48 [*Velez*]). Furthermore, the reasonableness of the analysis under s 97 must be assessed in light of the circumstances of each case (*El Achkar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 472, [2013] FCJ No 500 at para 29 [*El Achkar*]), within the context of the decision as a whole (see *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 at para 53, citing *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65, [2012] 3 SCR 405; *Newfoundland and Labrador Nurses’ Union v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] SCR 708 at para 14 [*Newfoundland Nurses*’]).

[20] Two of the grounds advanced by Mr. Ali, those concerning persecution based upon minority clan membership and religion, fall clearly within s 96 of the Act. Since the standard of proof, that of a balance of probabilities, under s 97 is higher than it is under s 96, it was unnecessary for the RAD to undertake a fulsome analysis under the higher standard. The RAD demonstrated it understood its role under s 97 (*Rajadurai v Canada (Minister of Citizenship and*

Immigration), 2013 FC 532, [2013] FCJ No 566 at para 46) with respect to the fear of revenge from family members. I find the RAD's analysis under s 97 to be justifiable, transparent and intelligible. The failure to conduct a separate analysis under s 97 for the Convention refugee grounds advanced by Mr. Ali is reasonable in the circumstances (see *El Achkar and Velez*, above).

C. *Additional Challenges to the Reasonableness of the RAD's decision*

[21] In addition to the above challenges to the reasonableness of the RAD decision Mr. Ali brings a potpourri of issues, including assertions that (i) once the RAD decided the RPD had applied the wrong legal test it (RAD) should have remitted the matter to another member of the RPD for redetermination; (ii) the RAD erred in failing to conclude that documentary evidence of marginalization of Reer Hamar constitutes persecution; (iii) the RAD improperly assessed Mr. Ali's assertion that Ethiopia does not accept Somalian refugees by noting that Somalian refugees are in Ethiopia; and (iv) in the face of conflicting country condition information the RAD was selective in its assessment of the evidence to which it assigned weight and failed to consider other relevant evidence.

[22] My analysis of these challenges to the reasonableness of the decision is brief. Section 111 of the Act states that the RAD may refer a matter back to the RPD if it cannot render a decision without hearing the evidence. The error identified by the RAD was clearly a question of law; namely, the standard of proof required by s 96 of the Act. The RAD did not err by assessing the evidence (taking a fresh look) and making its own determination based upon the correct standard. In my view, it was unnecessary to hold a new hearing in order to re-evaluate the

evidence that was before the RAD (see *Spasoja v Canada (Minister of Citizenship and Immigration)*, 2014 FC 913, [2014] FCJ No 920 at para 18).

[23] When Mr. Ali was in Ethiopia, he did not claim refugee protection. He explained in his Basis of Claim Form [BOC Form] that the Ethiopian government did not accept Somalis as refugees and did not offer them protection. The RAD noted that this assertion is contradicted by documentary evidence which demonstrates that the majority of refugees in Ethiopia are Somalis. Whether Somalis may claim refugee status in Ethiopia is not determinative of the reasonableness of the decision. The RAD simply made an observation based upon the evidence before it that Somalian refugees are found, in large numbers, in Ethiopia. That evidence appears to contradict statements made by Mr. Ali. The RAD cannot be faulted for having referred to this contradiction.

[24] Finally, with respect to grounds (ii) and (iv) set out in paragraph 21 above, documentary evidence corroborates the fact that the Reer Hamar may have been subjected to some degree of exploitation or marginalization. However, the RAD found that discrimination alone does not amount to persecution. The RAD assessed country conditions and attempted to ‘balance’ conflicting evidence against the backdrop that Mr. Ali and his family owned and operated a farm and a shop and appeared to live in relative peace before he left Somalia. The ‘balancing’ of the evidence is integral to the RAD’s role and demonstrates one of the many reasons for the deference doctrine. The perceived inadequacy of reasons is not a stand-alone ground of unreasonableness (*Newfoundland Nurses’*, above at para 14). Furthermore, the decision must be read within the context of the whole of the evidence (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654). Mr. Ali’s

assertion that some evidence was ignored or accorded improper weight must be considered within the context of the whole of the evidence and the decision. It is not the Court's role to seek a treasure trove of error within the decision or the decision-making process (*Newfoundland Nurses*', above at para 16). The ultimate test remains one of reasonableness.

VIII. Conclusion

[25] I am of the view the RAD correctly interpreted the standard of proof required by sections 96 and 97 of the Act. I am further satisfied that it reasonably applied the law to the facts. In sum, I find the decision to be justifiable, transparent and intelligible. Furthermore, it falls within the range of possible and acceptable outcomes which are defensible in respect of the facts and law. I would therefore dismiss the application for judicial review.

[26] The application for judicial review is dismissed without costs.

[27] Neither party proposed a question for certification and none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed
without costs.

“B. Richard Bell”

Judge

APPENDIX 'A'***Convention refugee***

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la

Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Decision

111. (1) After considering the appeal, the Refugee Appeal Division shall make one of the

Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Décision

111. (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y

following decisions:

substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

(a) confirm the determination of the Refugee Protection Division;

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

Referrals

(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that

(a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and

(b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.

Renvoi

(2) Elle ne peut procéder au renvoi que si elle estime, à la fois :

a) que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;

b) qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui ont été présentés à la Section de la protection des réfugiés.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-412-15

STYLE OF CAUSE: KASSIM MOHAMED ALI v THE MINISTER OF
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PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: BELL J.

DATED: NOVEMBER 3, 2015

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