Federal Court  Cour fédérale

Date: 20160108

Docket: IMM-1365-15

Citation: 2016 FC 26

Québec, Québec, January 8, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

MAHAD CALI CABDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB] dismissing the applicant's appeal from the Refugee Protection Division [RPD] of the IRB decision rejecting the applicant's refugee claim after finding he was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the IRPA respectively.

[2] I am of the view that the RAD's reasons triggered the obligation to consider subsection 108(4) of the IRPA and the RAD's failure to do so is a reviewable error. For the reasons that follow the application is allowed:

I. Background

[3] The applicant, Mahad Cali Cabdi is a male citizen of Somalia born in the town of Luuq located in the southwestern Gedo province in October, 1987. He lived in Beled Hawo, located on the border with neighbouring Kenya and Ethiopia from 1991 to 2007 when he left Somalia.

[4] The applicant had five siblings, his older brother died in Somalia in 2001 as a result of inner clan warfare and his older sister died in Somalia in a bomb attack on her home by members of the Hawieye clan. In 2006 four unknown men attacked the applicant, accusing him of being a non-believer and threatened to kill him if they saw him again. In mid-2007 the applicant left Somalia, joining another brother in South Africa. That brother was killed in South Africa a few months later by an anti-Somalian mob. In September, 2010 the applicant himself was attacked and beaten in South Africa by an anti-Somalian mob and left for dead. The applicant's father was murdered in 2010 by the militant group Al-Shabaab in Somalia. The applicant believes his father's murder was the result of his Sufi beliefs and the applicant fears that Al-Shabaab would target him due to his Sufi beliefs.

[5] The applicant left South Africa in 2012 for Sao Paulo, Brazil; he then travelled to Mexico and entered the United States., where he filed an unsuccessful asylum claim in June 2013. The applicant entered Canada in April, 2014 and filed his claim for refugee protection.

II. Consideration of Claim

A. *Refugee Protection Division*

[6] In October, 2014, the RPD rejected the applicant's refugee claim finding he was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the IRPA respectively.

[7] The RPD was satisfied that the applicant had established on a balance of probabilities his identity as a Somali national. However, the RPD was not satisfied that the applicant had established his identity as a Sufi Muslim. The RPD further concluded that the applicant had not provided persuasive evidence that he would be at risk of clan violence if he were to return to the Gedo province of Somalia and as such found that the applicant would not face a serious possibility of persecution or that he is a person in need of protection based on his clan affiliation.

[8] Finally, the RPD, despite finding that the applicant has failed to establish his identity as a Sufi Muslim, considered the documentary evidence relating to the threat of Al-Shabaab especially in the Gedo province. The RPD found the documentary evidence did not demonstrate: (1) that Al-Shabaab controls the Gedo province; (2) that Al-Shabab had exercised any control for some time; or (3) that Al-Shabaab harms or kills Sufis living in Gedo due to their religious beliefs. The RPD concluded that while Somalia is a country with many challenges, a state of instability does not in and of itself give rise to a well-founded fear of persecution.

B. *Refugee Appeal Division (Decision under Review)*

[9] The Applicant appealed the RPD's decision to the RAD. In initiating the appeal the applicant sought to place a number of pieces of new documentary evidence before the RAD pursuant to subsection 110(4) of the IRPA and requested the RAD hold a hearing pursuant to subsection 110(6) of the IRPA.

[10] In February, 2015 the RAD dismissed the appeal, confirming the RPD's decision that the applicant is neither a Convention refugee nor a person in need of protection.

(1) New Evidence

[11] In considering the applicant's proposed new evidence, the RAD addressed each item and conducted an analysis in light of the requirements of subsection 110(4) of the IRPA. The RAD ultimately concluded that the factual circumstances set out in the proposed new evidence did not arise after the rejection of the claim, the information was reasonably available, and the applicant could have been reasonably expected to present the evidence at the time of the RPD hearing, which occurred in two parts.

(2) Oral Hearing

[12] The RAD reviewed subsections 110(3), (4) and (6) of the IRPA, concluding that it only has a discretion to consider holding a hearing on an appeal where new evidence has been admitted on the appeal. In light of the RAD's conclusion that the applicant had failed to satisfy

the requirements for the admission of new evidence, the RAD determined that it must proceed without a hearing. The request for an oral hearing was denied.

(3) Consideration of the RPD Decision

[13] The RAD relied on Justice Michael Phelan's decision in *Hurgulica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, 30 Imm LR (4th) 115 to set out its role in reviewing the RPD decision. The RAD noted that it was an appellate body reviewing all aspects of the RPD's decision and making an independent assessment of whether the applicant is a Convention refugee or a person in need of protection. However the RAD also noted that it was in a position to recognize and respect conclusions of the RPD on issues such as credibility where the RPD enjoys a particular advantage.

[14] The RAD found that the RPD had erred on the issue of the applicant's Sufi identity and concluded the applicant did establish his identity as a Sufi Muslim. The RAD further concluded that the applicant had established subjective fear as a result of his family being victims of clan warfare in Somalia and violence perpetrated by Al-Shabaab. However, the RAD also found that the applicant had failed to establish that his subjective fear of persecution had an objective basis. The RAD therefore found that the applicant had not established that he would be persecuted or subjected to a risk to life, of cruel and unusual treatment or punishment or a danger of torture upon return to Somalia. The RAD concurred with and confirmed the RPD's ultimate conclusion.

III. Issues

[15] The application raises the following issues:

1) Did the RAD err in refusing to admit the applicant's proposed new evidence pursuant to subsection 110(4) of the IRPA? and;

2) Did the RAD err by failing to address subsection 108(4) of the IRPA in light of its findings of past persecution?

IV. Standard of Review

[16] The RAD's findings of fact and mixed fact and law including the assessment of the documentary evidence are subject to the reasonableness standard of review (*Ngandu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 423 at para 12, 34 Imm LR (4th) 68 [*Ngandu*]). The reasonableness standard of review also applies to questions regarding the admissibility of new evidence before the RAD pursuant to subsection 110(4) of the IRPA (*Ngandu* at para 13). Issues 1 and 2 will be reviewed on a reasonableness standard.

[17] The parties did not advance a position on the standard of review to be applied to a review of the RAD's obligation to consider subsection 108(4) of the IRPA.

[18] In *Kumarasamy v Canada (Minister of Citizenship and Immigration)*, 2012 FC 290 at paras 6, 11, 406 FTR 194 [*Kumarasamy*], Justice Roger Hughes held that the Court must review the failure to consider subsection 108(4) on the correctness standard of review. However, in *Soto v Canada (Minister of Citizenship and Immigration)*, 2014 FC 622 at para 18, 457 FTR 165, Justice Yves de Montigny held that "Following the Supreme Court of Canada's decision in *Smith*

v Alliance Pipeline Ltd, 2011 SCC 7, the trend has been to apply the reasonableness standard, as this is clearly a question of law within the specialized expertise of the tribunal." In addition Justice John O'Keefe, in *Nyiramajyambere v Canada (Minister of Citizenship and Immigration)*, 2015 FC 678 at para 36 held that the failure to consider subsection 108(4) is not a question of pure law but rather is one of fact and mixed fact and law thus attracting the reasonableness standard of review.

[19] A decision-maker's conclusions with respect to subsection 108(4) may come before the Court on judicial review in two different circumstances. The first, as is the case here, is the failure of the decision maker to consider the exemption. The second is the reasonableness of a decision-maker's findings where the decision-maker has in fact considered the subsection 108(4) exemption. This was recognized by Justice Donald Rennie in *Subramaniam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 843 at para 12, 10 Imm LR (4th) 124 where he states:

> [12] The determinative issue in this application is whether the Board erred by failing to consider section 108(4) of the *IRPA*. While there has been some disagreement on the appropriate standard of review for this question, the Federal Court of Appeal's reasoning in *Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 457 (CA), suggests a correctness standard. The Board is obligated to consider section 108(4) in every case in which it finds changed circumstances under section 108(1)(e). Thus, while any conclusion reached under section 108(4) would be reviewed on a standard of reasonableness, there is no deference in whether to consider section 108(4).

[20] While *Subramaniam* applies a correctness standard of review to the question of whether the Board failed to meet its obligation to consider subsection 108(4), this approach might well be reconciled with the reasonableness standard adopted in *Soto* and *Nyiramajyambere*. In considering the question of reasonableness the Court must consider the decision within the range

of possible acceptable outcomes which takes it colour from the context (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 59 [*Khosa*]; *Catalyst Paper Corp v North Cowichan (District)*, [2012] 1 SCR 5 at paras 16, 18; *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2013 FCA 75 at para 13, 444 NR 120). In some circumstances and for some questions that range might be so narrow as to include only one reasonable outcome (*McLean v British Columbia (Securities Commission)*, [2013] 3 SCR 895 at para 38; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 24, 341 DLR (4th) 710; *Ayyad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1101 at paras 35-36). The decision in *Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 457 at paras 4-6, 254 NR 388 (CA) [*Yamba*], which is considered later in these reasons, suggests that if a reasonableness standard of review is adopted in reviewing the question of the RAD's failure to consider the subsection 108(4) exemption then the range of acceptable outcomes would be narrowed to one.

[21] For the purposes of this decision I need not resolve the question. As was the case in *Mwaura v Canada (Minister of Citizenship and Immigration)*, 2015 FC 874 at para 12, I am of the opinion that the RAD's decision on this question was both unreasonable and incorrect.

V. Analysis

A. *Proposed New Evidence*

[22] The applicant relies on the decision of Justice Jocelyn Gagné in *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 at para 55, 31 Imm LR (4th) 127 to

argue that the RAD failed to recognize, that in conducting a full fact based appeal, it must adopt a sufficiently flexible approach to the admission of new evidence, and that in this case it erred by failing to do so.

[23] The respondent argues that the proposed new evidence, or the information contained therein, was reasonably available to the applicant and as such the proposed new evidence did not satisfy the requirements of subsection 110(4) of the IRPA. The respondent distinguishes *Singh*, noting that unlike *Singh* there is no indication that the applicant mistakenly believed the proposed new evidence had been made available to the RPD.

[24] I am satisfied that the RAD did not err in refusing to admit the applicant's proposed new evidence. The RAD's decision indicates that it was well aware of its role, that it assessed each piece of proposed new evidence, including the applicant's submissions on the new evidence, in light of subsection 110(4) and, "within the context of the totality of the Appellant's evidence adduced at the RPD." The applicant's explanation for failing to place the proposed new evidence before the RPD was that he could not have foreseen that the RPD would make negative findings on: (1) his identity; and (2) the question of objective risk. This is simply not consistent with the record. I concur with the RAD's conclusion that the applicant had the onus to put forward his case to the RPD as to why he should be accepted as a Convention refugee or a person in need of protection. It was not open for him to wait to forward requisite and relevant evidence until after the RPD rendered a negative determination.

B. *Assessment - sections 96 and 97 of the IRPA*

[25] The applicant submits that in determining the applicant was neither a Convention refugee nor a person in need in protection the RAD failed to have regard to the evidence before it. He further submits that the evidence discloses that Al-Shabaab is a violent militant group which commits abuses against Sufis and that while it lost territorial control over some cities it still carries out violent attacks against many individuals. Relying on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17, 157 FTR 35 (TD) the applicant submits that the RAD erred by failing to have regard to evidence documenting the volatile landscape of south and central Somalia and the re-establishment of Al-Shabaab control over some areas.

[26] I respectfully disagree. I am satisfied that the RAD acknowledged and considered evidence contradictory to its findings, but preferred other evidence including the 2013 British Country of Origin Information Report [the British Report] and the March 2012 Annual Report of the United States Commission on International Religious Freedom [the U.S. Report]. The British Report specifically addressed the question of Somalia's transitional government's control in the Gedo region of the country, and the U.S. Report notes the absence of reports of Al-Shabaab attacks on Sufis during the reporting period of April 1, 2011 to February 29, 2012. It is not for the Court, on judicial review, to reweigh the evidence before the RAD (*Khosa* at para 61).

C. *Failure to address subsection 108(4) of the IRPA*

[27] Paragraph 108(1)(e) of the IRPA provides that a claim for refugee protection shall be rejected if the reasons for which the person sought refugee protection ceased to exist. However, subsection 108(4) provides that paragraph 108(1)(e) does not apply to persons who establish that there are compelling reasons arising from previous persecution. The relevant provisions read as follows:

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants
(e) the reasons for which the person sought refugee protection have ceased to exist. (4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	e) les raisons qui lui ont fait demander l'asile n'existent plus. 1(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[28] In this case the parties dispute whether the RAD had an obligation to conduct an analysis under subsection 108(4). Both rely on Justice Paul Crampton's decision in *Alharazim v Canada*

(Minister of Citizenship and Immigration), 2010 FC 1044, 378 FTR 45 [*Alharazim*] to advance their respective positions.

[29] *Alharazim* interprets subsection 108(4) concluding that it is an exceptional provision that ought to be narrowly circumscribed to capture truly exceptional or extraordinary situations (*Alharazim* at para 49). The facts underpinning *Alharazim* differ from those here.

[30] In *Alharazim* Justice Crampton found that neither an explicit or implicit finding of past persecution had been made by the decision-maker. It was on this basis that *Alharazim* at para 36 was distinguished from the earlier decision of the Federal Court of Appeal in *Yamba*, which had considered what was then subsection 2(3) of the *Immigration Act*, which is now subsection 108(4) of the IRPA (*Kumarasamy* at paras 4, 8). In *Yamba* Justice Robertson states at paras 4-6:

> [4] In our respectful view, the Motions Judge was correct in holding that the Refugee Division is under an obligation to consider the applicability of subsection 2(3) of the *Act* once it is satisfied that refugee status cannot be claimed because of a change in country conditions under paragraph 2(2)(e). This conclusion does not detract from the fact that subsection 2(3) imposes the evidentiary burden on the refugee claimant to "establish that they are compelling reasons" for not returning to the country in which the past persecution arose. In support of our position we need go no further than the analysis offered by Hugessen J.A. (as he then was) in *M.E.I. v. Obstoj* , [1992] 2F.C. 739 (C.A.) at page 747 where he stated:
>
> > The solution to the conundrum, as it seems to me, must lie in the fact the Parliament intended a consideration of the matters raised in subsection 2(2) (and necessarily of subsection 2(3) as well) to be included in the consideration of whether or not a person meets the requirements of paragraph (a) of the definition [of Convention Refugee]. Such an intention is consistent with the placing of subsections 2(2) and 2(3) in the definition section of the *Act* rather than, as logic would otherwise

> suggest, in or adjacent to section 69.2 dealing with cessation.
>
> To put the matter another way, subsections 2(2) and 2(3), while at first blush they appear to deal only with the loss of a refugee status which has already been acquired, have in fact been extended by Parliament and incorporated into the definition by means of paragraph (b), so that their consideration forms part of the determination process itself.

> [5] The above passages confirms the understanding that as the Refugee Division is under an obligation to consider the matters set out in subsection 2(2) of the Act and since subsection 2(3) incorporates by reference paragraph 2(2)(e), the Refugee Division must consider the applicability of the former provision, whether or not the issue is expressly raised by the refugee claimant.
>
> [6] **In summary, in every case in which the Refugee Division concludes that a claimant has suffered past persecution, but this has been a change of country conditions under paragraph 2(2)(e), the Refugee Division is obligated under subsection 2(3) to consider whether the evidence presented establishes that there are "compelling reasons" as contemplated by that subsection** [emphasis added]. This obligation arises whether or not the claimant expressly invokes subsection 2(3). That being said the evidentiary burden remains on the claimant to adduce the evidence necessary to establish that he or she is entitled to the benefit of that subsection.

[31] *Yamba* is clear, where (1) a claimant has suffered past persecution, and (2) the reasons for which the claimant was seeking refugee protection have ceased to exist, the decision maker has an obligation to then consider the subsection 108(4) exception. The question then is whether or not the two conditions precedent has been satisfied in this case.

[32] The RAD acknowledges at para 56 of its decision that "members of the Appellant's family had been victims of violence perpetrated by Al-Shabaab and due to clan warfare in Somalia in the past. Therefore, the RAD accepts the Appellant's subjective fear upon return to

Somalia." In addition, the RAD does not reject the applicant's claim that he was accused of being a non-believer, was severely beaten and threatened with death while in Somalia.

[33] There is some suggestion in the jurisprudence that a clear statement conferring the prior existence of refugee status on the claimant is required to trigger the compelling reasons exception in subsection 108(4) (for example *JNJ v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1088 para 41, 194 ACWS (3d) 1225). There is no clear statement in this case. However, there is also jurisprudence establishing that the finding can occur through implication arising from the reasoning set out in the decision (*Decka v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 822 paras 11–15, 140 ACWS (3d) 354; *Alharazim* at para 36; *Kumarasamy* at para 10). To require a clear statement where the finding of past persecution, albeit implicit, is a necessary implication arising from the reasoning of the decision, would, in my view, be to elevate form over substance. I am of the opinion that the RAD made an implicit finding of past persecution satisfying the first of the two preconditions.

[34] With respect to the second of the preconditions, the RAD notes, relying on the U.S. Report and the British Report, that the threat Al-Shabaab poses to Sufi followers and the control exercised by Al-Shabaab in the Gedo region has been undermined. The RAD relies on this evidence to conclude at para 57 of its decision that "the Appellant has not established an objective basis for his personal fear of persecution or serious harm due to his identity as a member of the Marehan / Ali Dhere / Reer Quule clan and/or his religious identity as a Sufi-Sunni Muslim **upon return to Somalia today** [emphasis added]."

[35] I am of the view that the RAD decision reflects that the applicant has (1) suffered past persecution, and (2) that the reasons for which the applicant was seeking refugee protection have ceased to exist. In the circumstances I am of the opinion that the RAD's failure to consider the subsection 108(4) compelling reasons exception is a reviewable error.

[36] The parties have not identified a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter is returned to a different member for redetermination. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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