

Federal Court



Cour fédérale

Date: 20160422

Docket: IMM-4451-15

Citation: 2016 FC 462

Ottawa, Ontario, April 22, 2016

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

AHMEDNOOR FARAH HUSIAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada wherein the RAD confirmed the Refugee Protection Division [RPD] finding that the Applicant was neither a Convention refugee nor a person in need of protection.

I. Facts

A. *Background*

[2] The Applicant alleges to be a citizen of Somalia and a member of the Reer Hamar clan and Dhabarweyne sub-clan. He claims to fear members of the rival Habir Gedir clan as well as Al-Shabaab, which allegedly killed one of his brothers. The RPD and RAD both held that the Applicant had not established his identity and rejected his claim for refugee status in Canada.

[3] The RPD found that the Applicant had not established on a balance of probabilities that he was a Reer Hamar from Somalia. Mrs. Jamad Dhafè, allegedly the Applicant's great aunt, testified as an identity witness. Mrs. Dhafè was deemed not credible because her statements contradicted the Applicant's on many points. The Applicant also testified at the hearing but was found not credible with regard to his clan affiliation. The RPD was not satisfied by his answers to factual questions about the Reer Hamar and did not accept his explanation for knowing very little about the clan.

[4] On appeal, the RAD confirmed the RPD's decision. In doing so, it refused to admit the testimony of Ms. Amina Iman Farah, allegedly the Applicant's second cousin, since it was not new evidence and should have been submitted earlier.

[5] Justice Roger Hughes granted the application for judicial review of this decision on the basis that the RAD had made new credibility findings without giving notice to the parties or

giving them the opportunity to make submissions (*Husian v Canada (Citizenship and Immigration)*, 2015 FC 684).

II. Decision under Review

[6] The RAD, on its redetermination of the appeal, held that the Applicant failed to provide persuasive evidence that he was a national of Somalia, or of any other country, and confirmed the RPD's decision. Its main conclusions are summarized at para 63 of its reasons:

[63] The RAD has reviewed the submissions of the Appellant as well as all of the evidence in this claim. The RAD has found:

- The Appellant failed to provide credible personal testimony to ascertain his identity as a national of Somalia.
- The Appellant may have resided in Somalia at some time during his life. One of the affiants stated he had knowledge of the Appellant's father in Mogadishu, but did not identify a date. The RAD notes the Appellant's BoC document state [sic] that his father disappeared in 1992. The Appellant provided no persuasive supporting evidence as to when he was last present in Somalia.
- The Appellant was unable to provide persuasive evidence that he is a national of Somalia or any other country.
- The RAD finds the Appellant has provided evidence and information to corroborate he speaks the Somali language and that he has association with the Reer Hamar and Dhabarwyene [sic] clan. The RAD notes that these characteristics may be possessed by an individual who has a parent who is of Somali heritage, , [sic] but it does not identify that individual as a Somali national.

[7] The RAD first addressed the new evidence submitted by the Applicant. It mostly considered the new evidence to be admissible but of little use in establishing the Applicant's identity as a Somali national.

[8] It refused to grant the Applicant an extension of time to file further submissions. It noted that the Applicant had filed his Appellant record in time, and mentioned that the Applicant had not followed the formal process for applying for extensions of time or for filing late documents, if there were any.

[9] It reviewed the record and concluded that the Applicant had not established his identity. First, it listened to the audio recording of the RPD hearing and found that the Applicant's testimony was at times vague and evolving. It was not satisfied by his answers to several questions and considered that he should have had a greater knowledge of his alleged clan's heritage and of other clans in the area. Second, it reviewed the abovementioned Ahmed and Ali affidavits and gave them little weight as evidence of the Applicant's nationality.

[10] Last, it refused to grant the oral hearing requested by the Applicant. It found that subsections 110(3), (4) and (6) of the IRPA provide for oral hearings where there is new evidence that raises a serious issue with respect to the credibility of the Applicant, which is central to its decision, and which would justify allowing or rejecting the refugee protection claim.

III. Issues

1. Was the RAD's decision as to the Applicant's identity reasonable?

2. Was the RAD's decision not to hold an oral hearing reasonable?
3. Did the RAD breach natural justice or procedural fairness?

IV. Standard of Review

[11] The RAD's decision as to the Applicant's identity is to be reviewed on a standard of reasonableness, and accordingly its assessment of the evidence is entitled to deference (*Ibrahim v Canada (Citizenship and Immigration)*, 2016 FC 11 at para 12).

[12] The standard of review for the decision not to hold an oral hearing is reasonableness, as it involves the RAD's interpretation of its home statute (*Balde v Canada (Citizenship and Immigration)*, 2015 FC 624 at para 21).

[13] Issues of procedural fairness are subject to the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79).

V. Analysis

A. *Submissions of the Applicant*

[14] The Applicant argues the RAD's finding that he did not prove his Somali nationality was inconsistent with the evidence before it. His argument is twofold. First, the Applicant suggests that the RAD accepted or was willing to accept that he was Reer Hamar and that his father was a Somali national. Second, Somalia's citizenship law states that people with either of these

characteristics are Somali nationals. The Applicant suggests this error is due to the RAD's failure to take into consideration the national documentation package for Somalia, which included Somalia's citizenship law (*Myle v Canada (Citizenship and Immigration)*, 2007 FC 1073 at para 20).

[15] Regarding the RAD's findings of fact, the Applicant emphasizes that it found (1) that he had a Somali father, (2) that he was an ethnic Reer Hamar who has lived in Somalia, and (3) that there was no evidence he had status in any other country. These facts establish that the Applicant is a citizen of Somalia. Alternatively they establish that he has a right to claim Somali citizenship, and therefore his refugee claim must be assessed against Somalia (*Pavlov v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 602).

[16] The Applicant further contends that the underlying context of Somali citizenship law is a reason for giving it a broad scope and recognizing as Somali those of Somali heritage. He also suggests that his interpretation of RAD's reasons – that the RAD recognized that his father was Somali and that he had Somali heritage – is preferable as it is coherent.

B. *Submissions of the Respondent*

[17] The Respondent submits that the RAD did not find the Applicant's father was a Somali national. The RAD reasonably found that Ibrahim Mahi Ahmed did not have direct or persuasive knowledge of the Applicant's existence or identity in Somalia, and it fully appreciated that Mr. Ahmed claimed to know the Applicant's uncle and father and claimed to know that the man he

believed to be the Applicant's father had children. The Respondent also contends that the RAD found that the Applicant "may" have lived in Somalia, not that he had in fact lived in Somalia.

C. *Analysis*

[18] In my view, the RAD erred in its treatment of the new affidavit evidence introduced by the Applicant. The RAD admitted two affidavits which stated that the Applicant was a member of the Reer Hamar clan and Dhabarweyne sub-clan. I find that the RAD's findings with respect to these affidavits were capricious and unsupported by the facts.

[19] The first affiant, Mr. Ahmed, is a member of the Dhabarweyne sub-clan who claimed to know the Applicant's uncle and father. The RAD reasoned that his affidavit did not constitute evidence of the Applicant's nationality because the two men had never met in Somalia. What the RAD failed to consider was that they met in Toronto and that the Applicant had spoken to him about his father and uncle. This conversation satisfied Mr. Ahmed that the Applicant was indeed who he claimed to be. It would be pure speculation to endorse the RAD's analysis on the basis that either Mr. Ahmed or the Applicant might have been lying or mistaken.

[20] The second affiant, Mr. Ali, is a former settlement counselor who for many years worked closely with the Somali community in Toronto and provided statements in support of identity which were accepted and relied upon by the Immigration and Refugee Board. In his affidavit Mr. Ali states that he interviewed the Applicant and believes him to be a member of the Reer Hamar clan and Dhabarweyne sub-clan, considering the Applicant's knowledge of his clan and his description of his family relations and the area he lived in. The RAD gave little weight to the

affidavit because it found that Mr. Ali provided insufficient details regarding the questions he asked the Applicant. If that were the case, then an oral hearing should have been granted.

[21] The RAD also failed to consider the application of the facts to Somalia's law of citizenship, the Law No. 28 of 22 December 1962 – Somali Citizenship, which states the following:

Article 1. Acquisition of
Citizenship

Somali citizenship may be acquired by operation of law or by grant.

Article 2. Acquisition of
Citizenship by Operation of
Law

Any person:

a) whose father is a Somali citizen;

b) who is a Somali residing in the territory of the Somali Republic or abroad and declares to be willing to renounce any status as citizen or subject of a foreign country shall be a Somali Citizen by operation of law.

Article 3. Definition of
"Somali"

For the purpose of this law, any person who by origin, language or tradition belongs to the Somali Nation, shall be considered a "Somali".

[TRANSDUCTION] Article 1.
Acquisition de la citoyenneté

La citoyenneté somalienne peut être acquise par effet de la loi ou par attribution.

Article 2. Acquisition de la
citoyenneté par effet de la loi

Toute personne :

a) dont le père est un citoyen somalien;

b) qui est un Somali résidant sur le territoire de la République fédérale de Somalie ou à l'étranger et déclare être prêt à renoncer à tout statut de citoyen ou de sujet à un pays étranger détient la citoyenneté somalienne par effet de la loi.

Article 3. Définition de «
Somali »

Aux fins de la présente loi, toute personne qui par son origine, sa langue ou sa tradition appartient à la nation somalie sera considérée « Somali ».

[22] The RAD found that Mr. Ahmed knew a man he believed to be the Applicant's father back when he lived in Mogadishu. Had the RAD properly considered the fact that Mr. Ahmed and the Applicant met in person and discussed their mutual acquaintances, it may well have held that the Applicant's father was a Somali. Moreover, the RAD failed to consider the significance of the Applicant's sworn testimony to the effect that his father disappeared in Somalia in 1992, in the midst of the civil war. At paragraph 63 of its decision, cited previously, the RAD wrote:

[...] One of the affiants stated that he had knowledge of the Applicant's father in Mogadishu, but did not identify a date. The RAD notes the Appellant's BoC document state [sic] that his father disappeared in 1992. The Appellant provided no persuasive supporting evidence as to when he was last present in Somalia.

[23] The RAD placed a great deal of importance on the dates when the Applicant and his father had resided in Somalia, yet this was not determinative for the purposes of Article 2 of Somalia's citizenship law. If the Applicant's father was a member of the Reer Hamar clan who spent his entire life up until 1992 in Somalia, then it is hard to imagine he could have been anything other than a Somali citizen.

[24] The RAD further failed to consider whether there was evidence that the Applicant was a "Somali". Article 3 of Somalia's citizenship law describes a Somali in broad terms as "any person who by origin, language or tradition belongs to the Somali Nation". The RAD recognized that the Applicant spoke the Somali language and that he "has association" with the Reer Hamar clan and Dhabarweyne sub-clan, groups historically associated with the city of Mogadishu. The RAD erred by finding there was insufficient evidence to identify the Applicant as a Somali national without considering the legal effects of his Somali heritage.

[25] The comments of Justice Hughes in *Abdullahi v Canada (Citizenship and Immigration)*, 2015 FC 1164 at para 10, are appropriate in this situation. I find that the RAD was overly critical of the new affidavit evidence provided by the Applicant. It was seemingly intent to find fault with whatever was presented rather than to take a fair and reasonable view of the material provided. Having reviewed the decision, I doubt that there was any evidence that the Applicant could have supplied to satisfy the RAD of his identity as a Somali national.

[26] Given that the above findings are sufficient to return the matter to the RAD for redetermination, it is not necessary to consider whether it was reasonable not to hold an oral hearing or whether the RAD breached natural justice by refusing to grant the Applicant a time extension. I trust that counsel for the Applicant has made productive use of the past few months and will ensure that his submissions to the RAD are made in a timely manner.

[27] For these reasons, the application for judicial review is allowed. The matter is referred back to the RAD for redetermination in accordance with these reasons. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed.

The matter is referred back to the RAD for redetermination in accordance with these reasons.

There is no question for certification.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4451-15

STYLE OF CAUSE: AHMEDNOOR FARAH HUSIAN v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 12, 2016

JUDGMENT AND REASONS: TREMBLAY-LAMER J.

DATED: APRIL 22, 2016

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