

Federal Court



Cour fédérale

Date: 20160610

Docket: IMM-2632-15

Citation: 2016 FC 650

Ottawa, Ontario, June 10, 2016

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**ABDULAZIZ ISMAIL
(A.K.A. ABDULAZIZ MOHAMED ISMAIL)**

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr Abdulaziz Ismail sought refugee protection in Canada on the basis of his fear of persecution in his native Somalia, primarily by the militant group Al-Shabaab. Mr Ismail described numerous incidents in which he, members of his family, and others had been assaulted, harassed, threatened, or killed by members of Al-Shabaab.

[2] A panel of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board dismissed Mr Ismail's refugee claim on the basis that the situation in Somalia has improved since Mr Ismail left there in 2008. In particular, while Sufi Muslims, like Mr Ismail, had been attacked by Al-Shabaab in the past, no recent violence has been reported. Similarly, while Al-Shabaab has been known to forcibly recruit members, it primarily targets children; Mr Ismail is now in his late 20s. Accordingly, the RAD found that Mr Ismail's fear of persecution was not objectively well-founded. In addition, the RAD concluded that Mr Ismail's fears arose from the general conditions in Somalia; they were not personal.

[3] Finally, the RAD also found that Mr Ismail was not entitled to the benefit of the so-called "compelling reasons" exception, which applies where a person has endured a severe level of persecution in the past which has subsequently dissipated due to changes in country conditions. The RAD concluded that Mr Ismail's experiences did not rise to the required level of seriousness.

[4] Mr Ismail argues that the RAD erred in its analysis of his claim, both by applying the wrong legal standard and arriving at an unreasonable conclusion on the evidence. He also maintains that the RAD's assessment of the compelling reasons exception was unreasonable. He asks me to quash the RAD's decision and order another panel to reconsider his claim.

[5] I agree with Mr Ismail that the RAD's conclusions on the merits of his claim and the issue of compelling reasons were unreasonable. Therefore, I will allow this application for judicial review. There are two issues:

1. Did the RAD err in its assessment of the merits of Mr Ismail's claim for refugee protection?
2. Did the RAD unreasonably conclude that Mr Ismail was not entitled to the benefit of the compelling reasons exception?

II. Issue One – Did the RAD err in its assessment of the merits of Mr Ismail's claim for refugee protection?

[6] Mr Ismail submits that the RAD erred in three areas of his claim – his persecution as a Sufi Muslim, his risk of forced recruitment by Al-Shabaab, and his persecution as a minority clan member.

[7] The Minister maintains that the RAD's findings were all legally sound and reasonable on the evidence. I disagree. In my view, the RAD's conclusions about the risks Mr Ismail faced as a member of a minority clan and a potential target of Al-Shabaab's recruitment efforts were both unreasonable. I will confine my analysis to those two areas of the RAD's decision.

[8] The RAD accepted that clan violence was an ongoing problem in Somalia, including in Mogadishu, Mr Ismail's home town. It found that the risk of clan violence was general and not particular to him. However, the RAD failed to address whether the lack of family and clan support in Mogadishu presented an individualized risk of persecution. The RAD did allude to the lack of family support as a factor but failed to engage in an analysis on the issue, having regard to the documentary evidence before it.

[9] As for the threat of forced recruitment, the RAD found that Al-Shabaab primarily targets children. Therefore, it concluded that Mr Ismail was not at risk because he was then 26 years of age. In my view, on this evidence, there remained a possibility that Mr Ismail could be targeted for forced recruitment. The RAD should have considered whether that possibility amounted to a reasonable chance of persecution, which would bring Mr Ismail within the definition of a refugee.

[10] Therefore, I find that the RAD's decision did not represent a defensible outcome based on the facts and the law. It was unreasonable.

III. Issue Two – Did the RAD unreasonably conclude that Mr Ismail was not entitled to the compelling reasons exception?

[11] The RAD found that Mr Ismail was not entitled to receive the benefit of the compelling reasons exception because he had never actually been found to be a refugee. Therefore, the exception did not apply to him. In addition, the RAD found that the mistreatment Mr Ismail had experienced did not amount to “atrocious and appalling” persecution.

[12] In general, a person is not eligible for refugee status if the reasons for which he or she sought protection have ceased to exist (s 108(1)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] – see Annex for provisions cited). However, that general rule does not apply to persons who can show compelling reasons, based on past persecution or other serious mistreatment, why they refuse to avail themselves of the protection of their country of origin (s 108(4)).

[13] I agree with Mr Ismail that the RAD's conclusion that this exception did not apply to him was unreasonable. First, the provision does not require that claimants establish that they had previously been granted refugee protection based on past persecution. Rather, they must persuade the decision-maker, in this case, the RAD, that they previously held a well-founded fear of persecution in their country of origin, and that their experience explains their refusal to return there to avail themselves of that state's protection. In other words, claimants must show that they once qualified for refugee protection; they do not have to establish that they actually achieved it (*Perger v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 551, at para 15; *Nadjat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 302 at para 50; *Salazar v Canada (Citizenship and Immigration)*, 2011 FC 277 at paras 31-35).

[14] The RAD found Mr Ismail to be credible and accepted that he and his family had suffered harm, but ultimately concluded that due to the subsequent weakening of the clan system and of Al-Shabaab, he did not face a serious risk of persecution. In my view, a finding of past persecution is implicit in the RAD's findings. The reliance of the RAD on *Alfaka Alharazim, Suleyman v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1044 in this regard is misguided, as the Court in that case recognized that implicit findings of past persecution, together with a finding of changed circumstances, trigger the application of s 108(4).

[15] Second, while the exception requires a showing of compelling reasons, it does not require that the claimant establish "atrocious" or "appalling" mistreatment. However, the circumstances must at least be exceptional or extraordinary compared to other refugees (*Canada (Minister of Employment and Immigration) v Obstoj*, [1992] FCJ No 422).

[16] The evidence before the RAD showed that Mr Ismail and his family had endured ongoing harassment, suffering and abuse in Somalia. His father was murdered. Mr Ismail suffered depression and PTSD as a result of the traumatic events he experienced. This evidence certainly merited consideration by the RAD of the compelling reasons exception. Its conclusion to the contrary was unreasonable on the evidence.

IV. Conclusion and Disposition

[17] The RAD erred in some of its factual findings and those errors led it to arrive at an unreasonable conclusion. In addition, it unreasonably concluded that the compelling reasons exception did not apply to Mr Ismail. I must, therefore, allow this application for judicial review and order another panel of the RAD to reconsider Mr Ismail's case. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and the matter is returned to another panel of the RAD for reconsideration.
2. No question of general importance is stated.

"James W. O'Reilly"

Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Rejection

Rejet

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.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

...

[...]

Exception

Exception

(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.

(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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2632-15

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MOHAMED ISMAIL) v MINISTER OF CITIZENSHIP
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