

Federal Court



Cour fédérale

Date: 20160711

Docket: IMM-3196-15

Citation: 2016 FC 763

St. John's, Newfoundland and Labrador, July 11, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**ABDULKARIM AHMED
(a.k.a.: ABDULKARIM MOHAMED AHMED)**

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Abdulkarim Ahmed (the “Applicant”) seeks judicial review of the decision dated June 10, 2015 of the Immigration and Refugee Board, Refugee Appeal Division (the “RAD”) confirming the decision of the Immigration and Refugee Board, Refugee Protection Division (the “RPD”), refusing his refugee claim.

[2] The Applicant claims to be a citizen of Somalia and a member of the Reer Aw Hassan clan. He sought protection, pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”), on the basis that he would be harmed by members of Al Shabaab, Ethiopian troops and other armed groups in Somalia.

[3] The RPD rejected the claim in a decision dated February 27, 2015 because it found that the Applicant was not credible and would likely not be sought by Al Shabaab. The RPD concluded that his identity as a citizen of Somalia was established but his membership in the Reer Aw Hassan clan was not.

[4] In presenting his appeal to the RAD, the Applicant submitted new evidence and requested an oral hearing, pursuant to subsections 110(4) and 110(6) of the Act, respectively. The new evidence the Applicant sought to introduce consisted of excerpts from the Country of Origin Report on Somalia, the South Africa refugee document for the Applicant’s brother and his marriage certificate.

[5] The RAD found that the documents constituted new evidence within the meaning of subsection 110(4) of the Act. However, it concluded that the new evidence was not central to the RPD’s decision and did not justify allowing the claim. Accordingly, it did not hold an oral hearing.

[6] The RAD found that, contrary to the RPD’s decision, the Applicant had not established his identity as a citizen of Somalia. It also found him to be not credible.

[7] The Applicant argues that the RAD erred by engaging in an unreasonable, microscopic assessment of the evidence, relying on the decision in *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.).

[8] The Applicant also submits that the RAD breached procedural fairness by not giving him notice that the issue of national identity would be raised. He says his national identity was accepted by the RPD and accordingly, he did not argue the issue before the RAD. He relies upon the decision in *Ojarikre v. Canada (Citizenship and Immigration)*, 2015 FC 896 in this regard.

[9] Finally, the Applicant argues that the RAD erred by failing to hold an oral hearing since credibility and identity were the determinative issues before it.

[10] Subsequent to the hearing of this application for judicial review on February 4, 2016, the Federal Court of Appeal delivered its decision in *Minister of Citizenship and Immigration v. Singh*, 2016 FCA 96. Pursuant to a Direction issued on April 1, 2016, the parties were given the opportunity to comment on the application of that decision to this matter. The Applicant did not avail himself of this opportunity.

[11] The Minister of Citizenship and Immigration (the “Respondent”) argues no breach of procedural fairness occurred because the RAD is not required to hold an oral hearing even where the criteria in subsection 110(6) of the Act are met, and the Applicant was on notice that his identity was at issue. He also submits that the RAD’s identity and credibility findings are reasonable.

[12] The Respondent, in response to the April 1, 2016 Direction, argued the decision in *Singh*, *supra* is not relevant to this proceeding.

[13] The first issue to be addressed is the applicable standard of review.

[14] The RAD's identity and credibility findings should be reviewed on the standard of reasonableness; see the decisions in *Gebremichael v. Canada (Citizenship and Immigration)*, 2016 FC 646 at paragraph 8 and *Ghauri v. Canada (Citizenship and Immigration)*, 2016 FC 548 at paragraph 22. The issue of procedural fairness is reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 43.

[15] Section 110(6) of the Act describes when the RAD may hold a hearing:

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| (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3) | (6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois : |
| (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal; | a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause; |
| (b) that is central to the decision with respect to the refugee protection claim; and | b) sont essentiels pour la prise de la décision relative à la demande d'asile; |
| (c) that, if accepted, would justify allowing or rejecting the refugee protection claim. | c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas. |

[16] Receipt of new evidence by the RAD does not inevitably mean that an oral hearing will be held. In my opinion, subsection 110(6) gives the RAD discretion whether to conduct an oral hearing when it accepts new evidence. Since it has discretion, the RAD is not obliged to conduct an oral hearing, if the criteria in subsection 110(6) are made out.

[17] In my opinion, the RAD did not err by failing to hold an oral hearing. However, it committed a reviewable error by failing to put the Applicant on notice that it was concerned with the RPD's finding that he is a Somali citizen.

[18] Identity is always an issue in a claim for refugee protection; see the decision in *Yang v. Canada (Citizenship and Immigration)*, 2009 FC 681.

[19] At paragraph 7 the RPD said: “[t]he panel determines that the claimant is, on a balance of probabilities, a citizen of Somalia.”

[20] In my opinion, it was a breach of the duty of procedural fairness for the RAD to take issue with this finding without giving notice to the Applicant and this error justifies judicial intervention.

[21] The Applicant, in his Memorandum of Arguments, seeks costs in this proceeding.

[22] According to section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, costs may be awarded in immigration judicial review proceedings where there are “special reasons” for doing so.

[23] Special reasons include unfair or improper conduct of the part of the Respondent or conduct which causes a delay in the applicant’s application being determined in a timely manner; see the decision in *Paul v. Canada (Minister of Citizenship and Immigration)* (2010), 92 Imm. L. R. (3d) 271.

[24] I am not persuaded that the Applicant has demonstrated any special reasons for an award of costs and no costs will be awarded.

[25] In the result, this application for judicial review is allowed and the matter is remitted to a differently constituted panel of the RAD for redetermination. There is no question for certification proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a differently constituted panel of the RAD for redetermination. There is no question for certification arising.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3196-15

STYLE OF CAUSE: ABDULKARIM AHMED (aka.: ADULKARIM MOHAMED AHMED) V. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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