

Federal Court



Cour fédérale

**Date: 20170509**

**Docket: IMM-4266-16**

**Citation: 2017 FC 474**

**Ottawa, Ontario, May 9, 2017**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**MOHAMED ABDI ADEN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] Mohamed Abdi Aden [the Applicant] seeks judicial review of a decision made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, which dismissed the Applicant's appeal of a decision of the Refugee Protection Division [RPD], finding that the Applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act* SC 2001 c 27 [IRPA].

[2] The Applicant argues that the RAD erred by failing to admit new evidence, by inappropriately misapprehending evidence in the National Documentation Package [NDP] as being new evidence and inappropriately rejecting it, and by failing to evaluate the objective risk of persecution in Somalia. The Applicant asks that the decision be set aside and the Applicant's appeal be re-determined by a different member of the RAD.

[3] I find the determinative issue in this matter is the handling of the Applicant's *sur place* claim, which was identified by the RAD as being that "as a returning citizen who is visited the United States and Canada he cannot return to Somalia because Al-Shabaab would perceive him as having fraternized with Westerners". While not described as such by the RAD, in essence this is a *sur place* claim.

[4] For the reasons that follow, this application is allowed as I agree that the RAD did not appropriately analyse the *sur place* claim of the Applicant. In the interest of brevity, these reasons will only address the facts that are relevant to this determinative issue.

## II. **Relevant Background Facts**

[5] The RPD and the RAD both accepted that the Applicant was a citizen of Somalia. After his father and brother were killed in 1991 in a clan conflict, the Applicant and his sister were brought by their mother to Kenya. The Applicant lived in a refugee camp in Dadab, Kenya from the age of four until he fled Kenya in December 2014.

[6] In 2011, the Applicant and four friends formed a youth group, with the Applicant as its leader. The group carried out volunteer work for development programs inside and outside the

camp. They also put on information sessions about HIV/AIDS, female genital mutilation and the importance of peace.

[7] The Applicant was married in June 2014. In October 2014, he received a call from someone who identified themselves as belonging to Al-Shabaab, an Islamist terror group in control of parts of Somalia. The caller told the Applicant to stop all the group's programs, and accused him of being a spy against Al-Shabaab in the refugee camp.

[8] On October 25, 2014, two men from Al-Shabaab visited the Applicant's home and asked his wife about his whereabouts. They accused him of spying and said they would kill him. The Applicant and his wife went into hiding. The Applicant's uncle in Kismayo, Somalia sold the Applicant's familial home and sent the Applicant the proceeds. The Applicant travelled to Nairobi, and then used smugglers to travel through South America and Mexico to the United States, where he sought asylum in February 2015.

[9] The Applicant's asylum claim in the United States was rejected, and he was released from detention on September 28, 2015, while awaiting removal to Somalia. The Applicant travelled to Minneapolis, and then made an irregular crossing of the Canadian border, where he was apprehended and his claim referred to the RPD.

### III. **The Relevant Parts of the RPD Decision**

[10] The RPD heard the Applicant's claim on December 18, 2015, and denied the claim by oral decision at the end of the hearing. The RPD accepted the Applicant's identity as a national of Somalia and a resident of the refugee camp in Kenya, but found a lack of credible evidence to prove the existence of his youth group or his volunteer activities. The RPD found that there were

significant inconsistencies between his Basis of Claim [BOC] and oral testimony and between his testimony and that of his witness, Ms. Osman. There is a dispute between the parties as to whether the RPD performed a microscopic analysis and failed to take into account the significant points of agreement between the Applicant and his witness. As reconciling that dispute is not necessary given my finding with respect to the *sur place* claim, I will only say that these reasons are not to be taken as supporting or rejecting the position of either party with respect to that dispute.

[11] The *sur place* claim was put forward by the Applicant when, on re-examination by his counsel, he put forward information that if he was returned from North America, he would face a risk in Somalia from Al-Shabaab simply by virtue of being someone who had lived in Canada and the United States. This de-facto *sur place* claim was not addressed in the RPD decision.

#### IV. **The Relevant Parts of the RAD Decision**

[12] One of the submissions made to the RAD by the Applicant was that the RPD had not made any finding regarding the Applicant's risk from Al-Shabaab as a returnee from a western country. In response to that submission, on May 11, 2016, the RAD pointed the Applicant's counsel to an EASO Country of Origin Information Report on Somalia [EASO Report] and gave the Applicant the opportunity to make additional written submissions. This report had information indicating that Al-Shabaab did not control the Applicant's home city of Kismayo.

[13] In reply, the Applicant's counsel submitted a letter with additional documentary evidence to the RAD noting that the security situation in Kismayo remained volatile, that Al-Shabaab still engaged in sporadic attacks in the city, controlled many of the surrounding villages, and manned checkpoints on all roads into and out of Kismayo. The letter also pointed to portions of the

EASO report that indicated that Al-Shabaab carried out attacks in towns it did not control against those perceived to represent the government or the international community.

[14] In a relatively short decision the RAD noted it would apply the guidance of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [Huruglica] with respect to its review of the RPD decision. It addressed issues dealing with new evidence submitted by the Applicant and then examined the merits of the claim. The *sur place* claim was dealt with at paragraphs 27 to 30, after which the RAD confirmed the decision of the RPD that the Applicant was neither a convention refugee nor a person in need of protection.

V. **Positions of the Parties on the *Sur Place* Issue**

[15] The Applicant noted that it was the RAD that disclosed the risk associated with returning to Kismayo but that it relied only on the portion of the EASO Report indicating that the government had re-captured the city. From this, the RAD then concluded that the Applicant was not at risk because “there is nothing to indicate that Al-Shabaab is in full control of the territory”.

[16] The Applicant says the RAD conflated the state protection test by saying the terror group did not have full control rather than looking at whether state protection was available to the Applicant.

[17] The Respondent submits that the Applicant is not at risk because of his personal profile, since the RAD agreed with the RPD that he had failed to demonstrate he was a member of the Youth Group in the refugee camp in Kenya. As result, the Respondent says he would not be subject to risk from Al-Shabaab because he would only be perceived as Somalian, which was a general risk.

[18] The Applicant replies that he had lived in the refugee camp in Kenya since the age of 4, as result of which he has really never lived in Somalia and would not blend in particularly well as the Somalians suspect everybody they do not know.

#### VI. Standard of Review

[19] The standard of review for assessing a decision by the RAD is reasonableness: *Huruglica* at para 35.

[20] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

#### VII. Analysis

[21] In support of the RAD, the Respondent submits that the evidence suggests Kismayo is not under the direct control of Al-Shabaab. There is no real dispute of that fact. However, it misses the point. Given that documentary evidence which was submitted to the RAD shows that Al-Shabaab controlled most of the roads leading to Kismayo, there was reason to believe the Applicant could not get into or out of Kismayo without encountering Al-Shabaab.

[22] With respect to the Respondent's comment that the Applicant failed to demonstrate he was a member of the Youth Group that is not the risk which the Applicant put forward as part of the *sur place* claim. The risk was as stated in the report from the UK Border Agency, published in March 2015 citing Amnesty International with respect to risk for returnees to Somalia:

People returning to Somalia from overseas are extremely vulnerable unless they have strong clan and family connections, as

well as the economic means to establish a life. Somalis that have left, particularly those that have been in western countries, tend to be viewed as foreigners, and may be perceived to have western agendas. This in itself puts them at an increased risk of persecution.

UK Border Agency, Item 1.18, section 2.2.5, July 17, 2015

[23] The *sur place* risk was not about whether the Applicant's testimony was truthful, but about whether he would be perceived to be a member of a group—returnees from western countries—that faced a risk of persecution by Al-Shabaab. To dispose of this element of the Applicant's refugee claim, the RAD either had to determine that Al-Shabaab would not perceive the Applicant as a returnee from the west or that he would not face a risk of persecution in spite of Al-Shabaab perceiving him as a returnee from the west.

[24] In reviewing the EASO Report it had pointed out to the Applicant, the RAD acknowledged that it indicated the situation in South Somalia remained volatile but then found “there is nothing to indicate that Al-Shabaab is in full control of the territory”. Somehow, from that statement, the RAD then said in the next sentence “[t]he RAD therefore cannot agree with the submission of the Appellant that, if he returned to his hometown of Kismao, [sic] he would be in danger because Al-Shabaab would perceive him as having fraternized with Westerners”.

[25] I must confess, I do not see the connection between whether or not Al-Shabaab has full control of the territory and whether it would perceive the Applicant as a Westerner. It may simply be, as the Applicant suggested, that the RAD is conflating state protection with control by a terror group. Alternatively, it is making an entirely separate conclusion without having established the necessary factual basis. In either case, the reasoning is neither intelligible nor is it justified on the facts that were before the RAD.

[26] The RPD and RAD failed to analyse or assess the risk to the Applicant as a failed refugee claimant returning from the United States and Canada. That is not an assessment that the court can make by looking at the record to discern the underlying reasons. The failure to provide the analysis coupled with the very confusing concluding wording makes the decision unreasonable on the *Dunsmuir* criteria.

[27] The application is allowed. The matter but will be returned to a different panel for redetermination.

[28] Neither party posed a question for certification and none arises on these facts.



**JUDGMENT IN IMM-4266-16**

**THIS COURT'S JUDGMENT is that:**

1. The application is allowed.
2. The matter is returned to the RAD for re-determination before a different panel.

“E. Susan Elliott”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4266-16

**STYLE OF CAUSE:** MOHAMED ABDI ADEN v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 2, 2017

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** MAY 9, 2017

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