Federal Court  Cour fédérale

Date: 20190121

Docket: IMM-427-18

Citation: 2019 FC 80

Ottawa, Ontario, January 21, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ABDIRAHMAN AHMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by Abdirahman Ahmed [the "Applicant"] of a negative Pre-Removal Risk Assessment ["PRRA"]. The Officer found that as per section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ["IRPA"], the Applicant was not likely to be personally at risk of torture, at risk to life, or at risk of cruel or unusual treatment or punishment if sent back to Somalia.

II. Background

[2] The Applicant's material indicates that he was born in Mogadishu, Somalia, on January 1, 1981. The Applicant submits that his family belongs to the Darood clan, which is a minority clan in Somalia. In or around January 1991, the Applicant alleges that Hawiye clan members killed a number of his family members in Somalia.

[3] In April 1991, the Applicant and his family entered Kenya as refugees.

[4] In December 1996, the Applicant and his family moved to San Jose, California.

[5] The Applicant indicates that as a result of an impending deportation from the United States ["US"] for his criminality, he decided to travel to Grand Forks, North Dakota from the state of Washington. On May 5, 2017, the Applicant took a taxi from Grand Forks to Emerson, Manitoba, to walk over the border into Canada.

[6] At the time, the Applicant was under reporting conditions to the Department of Homeland Security US Immigration and Customs Enforcement, as per an Order of Supervision dated 06/16/2015. One of the conditions was, "That you do not travel outside Washington for more than 48 hours without first having notified this agency office of the dates and places and obtaining approval from this agency office of such proposed travel".

[7] On May 5, 2017 and on May 6, 2017, the Applicant was interviewed by Canada Border Services Agency [“CBSA”] officers. During the interview on May 5, 2017, the following exchange occurred between the officer and the Applicant:

> Q: Why are you asking for Canada’s protection today, why can you not return to your country?
>
> A: Because my family fled the war, we left there and we have nothing to go back to. At the time I remember my family and my mom’s family were killed over there because of the warring tribes.
>
> Q: Is there a specific threat to you?
>
> A: ***No, there is no specific threat to me, but I am scared to go back because they would see me as westernized***.
>
> [Emphasis added]

[8] The Applicant stated at the Port of Entry [POE] that he had “…used a fake name to enter the USA and that now he is providing us his real name given to him by his father”. The border officer concluded that based on the Applicant’s criminal history, the Applicant was appearing to seek protection from the US judicial system. The border officer stated in regards to the Applicant that he had,“…currently been arrested for his 5th assault with the time frame of the last arrest and the fact there is no disposition in NCIC I suspect, based on previous cases, that this is part of an ongoing trial.”

[9] In his POE interview, the Applicant indicated that he was almost a US citizen, and was just waiting for the paper work, and then because of his criminality he was put under a deportation order. The Applicant told the POE officer that he has three children in the US and no relatives in Canada.

[10] The Applicant gave evidence that while in the US, he got "in trouble with the law". He has a laundry list of arrests, ranging from arrests for driving under the influence ["DUI"], to assault with a weapon, to criminal trespass. He was convicted of the following:

A. Assault 3 Class 3 Felony- 2000/03/31
B. DUI-2010/06/12
C. Disorderly Conduct- 2006/08/09
D. Resist Arrest- 2006/08/09
E. Criminal Trespass- 2006/06/22

[11] As the Applicant had been convicted on the assault charges, the Immigration and Refugee Board [the "Board"] convened an admissibility hearing on August 23, 2017. The Board found that the Applicant was inadmissible to Canada for serious criminality under section 36(1)(b) of the IRPA. A Deportation Order was issued by the Immigration Division on August 23, 2017.

[12] On August 29, 2017, the Applicant was found to be ineligible to make a refugee claim in Canada due to serious criminality, as per Article 1(F) of the 1951 Refugee Convention. On October 11, 2017, the Applicant submitted an application for a PRRA. This application was rejected on December 28, 2017.

[13] The Officer found that due to the August 29, 2017 decision, section 113(e)(ii) of the IRPA did not apply to the Applicant. Given that the Applicant is a person referred to in section 1(F), the Officer only examined the risk faced by the Applicant as enumerated in section 97 of the IRPA.

A. *Preliminary Motions and Directions*

[14] On May 17, 2018, Prothonotary Ring made an Order where she held that under the test in *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA), it was in the interests of justice to give an extension of time to the Applicant to file and serve their record. On July 20, 2018, Justice Favel provided further direction on the refiling of the record. Justice Elliot, on July 26, 2018, following an issue with the registry, directed the registry to accept the e-filed records as complying with the direction of Justice Favel.

III. Issue

[15] The issue is whether the Officer made a reasonable decision in rejecting the Applicant's PRRA application.

IV. The law

[16] Section 97 states:

Person in need of protection	**Personne à protéger**
97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel	b) soit à une menace à sa vie ou au risque

and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

V. Standard of review

[17] In *Mbaraga v Canada (Citizenship and Immigration)*, 2015 FC 580, Justice Noël held that a review of a PRRA decision is to be reviewed on the reasonableness standard, citing a number of cases to support this conclusion (*Pareja v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1333 at para 12; *Kandel v Canada (Minister of Citizenship and Immigration)*, 2014 FC 659 at para 17).

[18] Based on this holding, I find that the same standard of reasonableness should apply.

VI. Analysis

[19] The Applicant was an adolescent when he came to the United States. By the time he was refused the PRRA, the Applicant was 37. With this history, the Applicant submits that he has become "westernized" and would not be able to negotiate surviving in Somalia by himself. The Applicant argued that the Officer overgeneralized and did not complete a proper legal examination of what was a risk to the Applicant.

[20] The Applicant further argued the Officer erred by determining that the risk must be personalized. The Applicant submits the Officer equated a risk faced personally with individualized risk, and that the Officer made a "refusal on the basis that the applicant is not personally subject to risk." The Applicant said that "there must be a difference between a risk faced personally and risk not faced generally. Otherwise, it would be unnecessary to include the phrase 'not faced generally'."

[21] The Applicant submitted that the Officer had to look at "similarly situated" persons with the same profile as the Applicant who were at risk. The Applicant presented that the jurisprudence is in conflict around the interpretation of section 97 and "personalized risk". The Applicant relies on the holding in *Dunkova v Canada (Citizenship and Immigration)*, 2010 FC 1322 ["*Dunkova*"] to support this argument. The Applicant argues that *Dunkova* stands for the proposition that objective evidence on similarly situated individuals must be considered on a section 97 analysis. Thus, if *Dunkova* is good law, then the Officer erred by not considering, "…the documentary evidence before him or her, to determine whether the objective evidence

indicated that the ill treatment of people sharing the applicants' [sic] profiles would subject the applicant personally to a section 97 risk in Somalia". The Applicant argued that the finding in *Dunkova* is in conflict with the finding in *Shire v Canada (Citizenship and Immigration),* 2014 FC 795 ["*Shire*"] at paragraphs 55 and 56.

[22] *Shire* was a case argued by the same counsel as in this case. *Shire* also involved a negative PRRA arising from a citizen of Somalia that was of the Darod tribe, specifically from the Marehan (Marlehaan) subtribe or subclan. I note that in our case the spelling is Darood which I understand is the same tribe that is spelt a number of different ways. In that case, the applicant fled to Kenya from Mogadishu and then traveled to the US where he made an unsuccessful asylum claim before he came to Canada. Justice Strickland noted at paragraph 55 of *Shire*, "…the Applicant's submission that section 97 does not require personal targeting, as he is similarly situated to a group being targeted, is not accurate. Section 97 requires the Applicant to demonstrate a personalized risk". Justice Strickland further relied on the ruling of the Federal Court of Appeal in *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31 ["*Prophète*"] for her finding.

[23] In our matter, the profile that the Applicant advances as "similarly situated" is that the Applicant came to the US when he was an adolescence. In his material it says he was 15 years old (in another place in the material he says 10 years old) so he barely speaks Somali, and that his, "…culture, expression and attitude is that of Western Culture". He submits that most of his tribe members were decimated by the civil war and the remaining tribe members are threatened by the ongoing presence of Al-Shabab.

[24] I do not accept the Applicant's submission that the jurisprudence is contradictory, as the cases presented as being at odds are not in fact in opposition to each other regarding the relevant legal test. Rather, the distinction between these cases is on the facts of each case, and how the facts are applied to the section 97 test.

[25] At paragraph 7 of *Prophète,* which was relied on by Justice Strickland in *Shire*, the Federal Court of Appeal is clear that:

> The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant 'in the context of a *present* or *prospective* risk' for him. (*Sanchez v. Canada (Minister of Citizenship and Immigration), 2007 FCA 99 (CanLII) at paragraph 15*)
>
> [Emphasis in the original]

[26] The Federal Court of Appeal then indicated that the evidence on the record allowed the Application Judge to conclude there was no personalized risk that was not faced generally by other individuals in or from Haiti.

[27] This interpretation was also discussed in *Barthelemy v Canada* (Citizenship and Immigration), 2011 FC 1222 ["*Barthelemy*"]. In *Barthelemy,* Justice de Montigny was hearing an application for judicial review of a decision by the Refugee Protection Division. Justice de Montigny held at paragraph 22 that, "…risk must be assessed in light of the applicant's personal situation; however, the applicant did not establish a personalized and prospective risk before the RPD". At paragraph 23, Justice de Montigny found that the Haitian diaspora as a whole cannot be considered as a risk group, and that risk has to be considered on an individual basis. At

paragraph 28 of the decision, Justice de Montigny further stated on the section 97 analysis that, "…Given the evidence in the record, it was reasonable for the panel to find that the applicant would not personally face a risk not shared by other citizens in Haiti. Once again, this was a question of fact for which this Court must show great deference."

[28] Similarly on our facts, I would agree that the evidence on the record and the documentary evidence that the officer's decision was reasonable. The Officer noted at page 11 of the decision, drawing on the Applicant's own words in the interview, that the Applicant did not face a personalized threat, but rather faced a generalized threat (that the Applicant would be seen to be "westernized", and therefore could be in danger on that basis).

[29] The Officer relied on the UN High Commissioner 2017 Report *Protection of Civilians: Building the Foundation for Peace, Security, and Human Rights in Somalia* said that clan warfare is a destabilizing influence in Somalia. The Officer cited a report done by "Landinfo" in February 2017, which noted that a number of violent incidents have occurred in Mogadishu. Finally, the Officer consulted a March 2017 report from the Danish Council, which noted that:

> Whether returnees from abroad are targeted or not by al-Shabaab will depend on how they behave and dress and who they are affiliated with. Several sources mentioned that persons returning will be under close monitoring, as al-Shabaab in general will be aware of newcomers, and a new face will be reason enough for background checks and questioning. An NGO working in Somalia concurred that an outsider risks being stopped and questioned at checkpoints, as a new face will raise suspicion of spying. The questioning will often be about the determination of the person's identity. According to the source it is rather easy for al-Shabaab to identify a Somali person by the person's name, his/her mother's name, grandmother's name, and home village.
>
> According to an international organisation the fact that a person has been abroad, including in the West, is not in itself important

> when returning to an al-Shabaab area. What is important is his/her clan, and the returnee will need relatives who are not in bad standing with al-Shabaab and who can vouch for them. If returnees are related to clans or individuals that are well regarded in al-Shabaab, they are likely to be safe. If not, he/she might face at least some initial scrutiny.

[30] The Officer found, then, that the Applicant makes his claim based solely on his membership in particular groups (his minority clan status and as a "westernized" individual). Therefore, the Applicant has not satisfied that he can demonstrate a particular "personalized risk", which is required by section 97 of the IRPA. Membership in particular groups did not provide sufficient grounds, in the Officer's finding, to justify a finding on a section 97 analysis.

[31] Reasonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision making process and also the decision must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12). In sum, this application must fail as the decision is reasonable.

VII. Certified Question

[32] The Applicant proposed on the day of the hearing the following question for certification:

> Does the phrase "would subject them personally" in IRPA section 97(1) encompass risk to the person because the person is similarly situate to others at risk or is the phrase limited only to individualized risk?

[33] The Respondent opposes the certification of the question based on the fact that the question would not be dispositive of the matter before me. The Respondent further argues that there is no confusion in the jurisprudence, and rather that this case is distinguishable on the facts.

[34] I agree with the Respondent that this question would not be dispositive of this matter, as there was little to no evidence that similarly situated persons were subject to risk, or that the Applicant faced a personalized and individualized risk. Therefore the case is distinguishable on the facts and there is no confusion in the jurisprudence only the same law applied to different facts which can lead to different results.

[35] This decision is reasonable and based on the evidence that was before the decision maker.

JUDGMENT in IMM-427-18

THIS COURT'S JUDGMENT is that:

1. This Application is dismissed; and

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-427-18
STYLE OF CAUSE:	ABDIRAHMAN AHMED v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	DECEMBER 18, 2018
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	JANUARY 21, 2019

APPEARANCES:

David Matas	FOR THE APPLICANT
Brendan Friesen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Matas Barrister and Solicitor Winnipeg, Manitoba	FOR THE APPLICANT
The Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT