

Date: 20091001

**Dockets: IMM-3998-09
IMM-4664-09
IMM-4721-09**

Citation: 2009 FC 993

Ottawa, Ontario, October 1, 2009

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ABADIR ALI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION
AND THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR ORDER AND ORDER

Introduction and background

[1] The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness (the “Ministers”) plan to remove the Applicant to his country of nationality – Somalia. As will be seen, the place in Somalia where it was first contemplated he would be removed to is Somaliland where he was born; it is a region located in northwest Somalia.

It now planned to remove him to Bossaso in Puntland, a region in the northeast. Mr. Ali seeks to stay that removal which is scheduled to take place in the first two weeks in October of this year. He is currently incarcerated on Immigration Hold, at the Innes Detention Centre in Ottawa, he has been there since February 1, 2008. He has had the benefit of several detention reviews as required by law, but it has been determined by the Immigration Division he is to remain in detention.

[2] The matter of the Applicant's stay request first came before me on an urgent basis on September 22, 2009, in the morning. The Applicant had been informed orally, on September 15, 2009, his 2004 deportation order would be enforced on September 22, 2009, late in the morning. The travel arrangements contemplated he would be taken from detention by two CBSA officers who would escort him to Nairobi Kenya on flights from Montreal and Amsterdam; he would then be accompanied to the point of departure for his flight to Mogadishu, Somalia. Prior to his departure from Nairobi, the Applicant would be provided with approximately 150 euros to purchase onward transportation by air or land to the North [of Somalia] if he so wishes and he, at that time, would also be provided with the daily schedule of flights from Mogadishu to Hargesia, in Somaliland.

[3] After hearing the parties briefly on September 22, 2009, I granted Mr. Ali an interim stay on condition he not be released from detention. I set the hearing of the stay for Friday, September 25, 2009 at 15:00 hours. Because of the voluminous material filed in support of the stay, the fact the Respondent had filed a written response on the morning of September 22, 2009, which the Court had only scanned briefly and counsel for the Applicant had not seen and the time constraints surrounding his removal, fairness dictated the issuance of an interim stay. During that short hearing, I drew to both counsel's attention this Court's decision in *Aden v. Canada (Minister of Citizenship*

and Immigration), 2009 FC 561 (*Aden*), where I granted a stay of Mr. Aden's removal, via Mogadishu, to the north of Somalia; the underlying judicial review application, in that case, was that of a PRRA Officer's decision Mr. Aden would not be at risk.

Background

[4] Mr. Ali is 26 years old. At the age of eight, he entered Canada with his step mother in 1991; they claimed for refugee status and were both successful in October 1992. He became a permanent resident of Canada on May 28, 1993.

[5] On February 10, 2004, he was the subject of an inadmissibility report, under subsection 44(1) of the *Immigration and Refugee Protection Act (IRPA)*, for serious criminality on account of an aggravated assault he was charged on February 2001 and convicted on February 4, 2002. He was declared inadmissible; a deportation order was issued against him on May 12, 2004. He lost his appeal to the Immigration Appeal Division (IAD), leave to appeal was refused by a judge of this Court. The May 2004 deportation order is the legal basis for his removal.

[6] Mr. Ali was detained by Immigration Officials in 2004 and 2006. On both occasions, he was released subject to conditions which he breached. In 2006, Immigration Officials decided not to proceed with his removal to Somalia. He was issued a warning not to engage in further criminal activity. Prior to the February 2002 conviction, Mr. Ali had a previous string of four minor convictions in the Youth Court.

[7] On July 26, 2007, Mr. Ali was arrested by the Ottawa Police on a charge of aggravated assault on a young woman. The assault was particularly vicious; the victim was brutally beaten and was lucky to survive. He was convicted in the late 2007 and sentenced on January 3, 2008.

[8] Being a Convention Refugee, Mr. Ali could not be removed to Somalia unless he was found to be a danger to the public, under paragraph 115(2)(a) of IRPA. On May 9, 2008, Mr. Ali received notice the Immigration authorities intended to seek an opinion he was a danger to the public. Through counsel, he made submissions. On June 30, 2009, the Minister's Delegate (the "Delegate") issued an opinion to the following effect: (1) he was inadmissible on grounds of serious criminality; (2) he was a danger to the public; (3) he would not be at any more risk than anyone else in Somalia and any minimal risk he could possibly face in Somalia was greatly outweighed by the danger he poses to Canadian society. He did not meet the tests in sections 96 and 97 of IRPA; and, (4) despite the fact he has no family in any part of Somalia (or Somaliland) there were insufficient humanitarian and compassionate factors present to warrant favourable consideration for allowing him to remain in Canada.

The Stay Application and its underpinnings

[9] Mr. Ali's stay application is grafted to three applications for leave and judicial review, launched by Mr. Ali's new counsel over the last couple of months. These applications are:

- (1) IMM-3998-09 where the underlying decision is the Delegate's decision, dated June 30, 2009, Mr. Ali was a danger to public and would not be subject to a personalized risk of return to Somalia. The application for leave and judicial review is seemingly filed late.

The Applicant as he must, under Rule 6 of the *Federal Courts Immigration and Refugee Protection Rules*, in his leave application did request an extension of time to file and serve his leave application. According to subsection 6(2) of the *Federal Courts Immigration Rules*, a decision on whether to grant the extension is to be decided at the same time and on the same materials as the application for leave. Paragraph 72(2)(c) of IRPA provides the Court may, for special reasons, allow an extended time for the filing and serving of the leave application.

- (2) IMM-4664-09 where the underlying decision is said to be “a Removal Order made by a Senior Immigration Officer on September 18, 2009 ...”
- (3) IMM-4721-09 where the underlying decision is dated September 21, 2009, made by Enforcement Officer Gavin Beck (the “Enforcement Officer”), refusing to defer Mr. Ali’s removal to Somalia and specifically to Mogadishu, leaving it up to Mr. Ali to somehow make his way to the north.

[10] At the hearing of the stay application on Friday, September 25, 2009, it was necessary to clarify some issues related to the underlying applications for leave, to which the stay application was grafted, since counsel for the Respondent took the position in her written material the Applicant was in error, in linking his stay application to Court File IMM-4664-09, because no removal order was made by an immigration officer on September 18, 2009. All that happened that day was that the Applicant was provided with a copy of the 2004 deportation order. In addition, the previous day his

legal counsel was advised in writing Mr. Ali would be removed from Canada on September 22, 2009.

[11] After discussion with the Court, his counsel recognized his client's stay application could not be grafted to the leave and judicial review application in IMM-4664-09. As a result the stay application grafted to IMM-4664-09 is dismissed.

[12] Mr. Ali has also linked his stay application to IMM-3998-09, which is an application for leave and judicial review of the Delegate's June 30, 2009 decision he was a danger to the public and there were no compelling factors which would tip the scale he not be removed to Somalia. His leave application raises two problems. First, it is out of time and whether to extend time will only be decided by a judge at the same time as that judge decides the leave application. Second, the Applicant is late in serving and filing his leave application record and his application to extend time to do so is now before a judge of this Court for decision. If extension of time is refused, that is the end of the leave application.

[13] In respect of his stay request linked to IMM-3998-09, it was not argued before me, I had no jurisdiction to grant the stay because there was no matter before this Court since a decision whether to extend time to enable Mr. Ali to commence IMM-3998-09 has not yet been decided. Moreover, the decision whether to extend time for serving and filing his application record on the leave application is outstanding and is being vigorously opposed by the Respondent. In the circumstances, it is prudent, in my view, not to decide this stay application linked to IMM-3998-09. Such linkage is too tenuous at this stage of the proceedings. My decision in this respect does not cause Mr. Ali any

prejudice because the heart of his stay application is the recent change of circumstances in Somalia, a matter put before the Enforcement Officer who adopted, by incorporation, the Delegate's reasoning on the risk Mr. Ali might face if removed to Somalia. In this way, the Delegate's views may be taken into account when reviewing the Enforcement Officer's decision, which is being challenged under IMM-4721-09, to which the stay application is properly grafted.

The Enforcement Officer's decision not to defer

[14] As noted, Enforcement Officer Beck decided on September 21, 2009 not to defer Mr. Ali's removal to Somalia and specifically to Mogadishu. Counsel for Mr. Ali had requested deferral by letter dated September 20, 2009 (a Sunday), which reached Mr. Beck on Monday, September 21, 2009.

[15] The basis for Mr. Ali's request for deferral was "on the basis of a recent change in country conditions." In support of that proposition, Mr. Ali's counsel submitted:

- The affidavits of Yusuf Kadie who travelled to Somalia for two months in April and May 2009.
- The affidavit of Faisal Jama who is the Applicant's uncle from his mother's side.
- A petition from members of the Somalia community in Ottawa that Mr. Ali's removal be deferred on the basis of recent changes in country conditions.

- Various documents from organizations such as M.A.P. (Mentorship – aftercare – presence) as to Mr. Ali’s chances of being rehabilitated.
- Various documents on country conditions in Somalia, Somaliland and Puntland.

[16] In his reasons, officer Beck summarized Mr. Ali’s reasons for deferral to be:

- Since July 2009, when Mr. Abadir [*sic*] was served with his Danger Opinion, the country conditions have changed.
- Mr. Abadir [*sic*] is at risk of returning to Somalia due to new circumstances occurring with the last two months.
- The removal of Mr. Abadir [*sic*] be deferred until the determination of a risk assessment, until the country conditions change, and to give a possibility of rehabilitate.

[17] He then listed the documents enclosed in the September 20, 2009 submissions from Mr. Ali’s counsel.

[18] He recognized he had discretion to defer a removal under section 48 of IRPA.

[19] He next wrote:

Mr. Abadir’s [*sic*] counsel is requesting to postpone his removal date indefinitely or until such time a new risk assessment can be made.

Since July 2009 when Mr. Abadir [*sic*] was served with his Danger Opinion, the country conditions have changed. Thus, Mr. Abadir [*sic*] is at risk of returning to Somalia due to the new circumstances occurring within the last two months.

[20] Officer Beck then mentioned the fact Mr. Ali had been found to be a danger to the public in June 2009 and said: “It is very important to note that this Danger Opinion supersedes any risk Mr. Abadir [*sic*] faces upon his return to Somalia.” (My emphasis.)

[21] He viewed the scope of his authority, as an Enforcement Officer, in the following terms:

I must mention that as an Enforcement Officer with the Canada Border Services Agency, it is not within my authority to make a proper determination of risk that the client may or may not face upon return. However, I do note that the balancing of risk between Mr. Abadir’s [*sic*] return to Somalia and the danger he poses to the public of Canada has been already addressed in the Danger Opinion of June 2009. I have taken into consideration the information presented to me within the deferral request dated on September 21, 2009 and have reasonably concluded that this information would not influence the balance of risk previously conducted by the Minister of Citizenship and Immigration Canada. (My emphasis.)

[22] Officer Beck next considered the request that (in his terms) “the removal of Mr. Abadir Ali be deferred until the determination of a risk assessment, until the country conditions changes and to give a possibility to rehabilitate” to which he answered:

“I am unable to grant a deferral of removal for the above mentioned reasons as I am not presented with an alternative date of removal. Therefore, should I defer the removal of Mr. Abadir [*sic*] for any of these reasons the deferral would be for an indefinite period of time.” (My emphasis.)

[23] He expressed the crux of his decision in these terms:

“Mr. Ali Abadir is requesting that his removal be deferred indefinitely because he has stated that he cannot return to Somalia. I am unable to do so because it is important to note that an enforcement officer has little discretion to defer a removal, however, if an enforcement officer does choose to exercise this discretion, they must do so while continuing to enforce a removal order as soon as reasonably practicable.

[24] Officer Beck concluded, based on the information he had before him, he “was not satisfied that a deferral of the execution of the removal order is appropriate in the circumstances of this case.”

The change of travel arrangements and the Applicant’s response

[25] The Court was advised in the morning of September 25, 2009, the day for the hearing of the stay, that an affidavit had been filed the previous afternoon by the Ministers which outlined “new travel arrangements [that] have been made for the Applicant”. They were:

- CBSA will arrange to remove the Applicant in or about the first or the second week of October 2009.
- CBSA agents will pick up the Applicant at the Innes Detention Centre in Ottawa and drive him to Montreal.
- In Montreal, CBSA agents will board a direct flight with the Applicant to Nairobi, Kenya.

- In Nairobi, private security personnel will accompany the Applicant to board a direct flight to Bossaso, a Northern part of Somalia by private charter. Private security personnel will accompany the Applicant on this direct flight from Nairobi to Bossaso.
- The Applicant will not be removed to Mogadishu, Somalia.
- The Applicant will not transit through Mogadishu.

[26] These new travel arrangements are an obvious response to the concerns which this Court expressed in Aden.

[27] The new travel arrangements, made on behalf of the Minister, drew a response from Mr. Ali in the form of an affidavit, dated September 24, 2009, sworn by Mr. Abdirahman Ali. He touched on a number of points some of which deal with the new travel arrangements. These points were:

- Mr. Ali's father was a political activist and a Somali National Movement ("SNM") fighter and if he is deported back to Somalia "they will capture and torture him for revenge because of his father's activism." (This fact was also before the Minister's Delegate.)
- "If the applicant is deported to Bossaso, in which there are people who are looking for his father, he will be killed. Bossaso is on the border between Puntland and Somaliland and there continues to be tension and conflict between Somaliland and Puntland over

the regions of Sool and Sanag. The Private Security details who escort people which are in the most part Somali because they are the only ones who can go to Somalia are corrupted individuals who buy and sell captives as slaves. There is no evidence that Ali, will be dropped in Bossaso.”

- The Applicant “is a young kid who had only bad companions and he deserves a chance to be rehabilitated.”
- He stated his knowledge Mr. Ali’s father is Issaq and his mother Warsangeli and that his father “waged war against Siad Barre and the Darod in Puntland region and if he is deported in any part of Puntland or Bossaso the son will be killed or tortured because of his father’s activities.

[28] Mr. Abdirahman Ali’s affidavit was corroborated in part by the affidavit of Mohammed Tani also sworn on September 24, 2009. The thrust of that affidavit is to corroborate the fact of Mr. Ali’s father’s background is a “prisoner of conscience” who with him had been jailed for 6 ½ years. He confirmed Mr. Ali’s father was a well known political activist who belonged to the SNM political movement and angered a lot of people in the Puntland region. He was of the view, if his son was deported to Puntland, he will be killed or prosecuted. He considers Mr. Ali’s deportation to Somalia as a “travesty of justice” because (1) he came to Canada as a young child and does not know any other place to call home; (2) he will be in danger in Somalia “that is full of Shahaab extremists who would see him as an agent of the west”; and, (3) he reiterated because the father was

a political activist against the Southern government, the Applicant would not be safe in any place in Southern Somalia such as Puntland.

Analysis

[29] For reasons previously stated, I will limit my consideration of the stay as only linked to the decision of Officer Beck not to defer Mr. Ali's removal to Somalia and, as a result of the new arrangements, specifically to Bossaso which is in Puntland.

[30] The law is clear, to obtain a stay from this Court, Mr. Ali has the burden of establishing each element of the three part test of: (1) one or more serious issues; (2) he will suffer irreparable harm if a stay is not granted; and, (3) the balance of convenience favours him.

[31] Before considering the three part test, it is appropriate to set out the terms of section 48 of IRPA:

Immigration and Refugee Protection Act
(2001, c. 27)

Loi sur l'immigration et la protection des réfugiés (2001, ch. 27)

Enforceable removal order

Mesure de renvoi

48. (1) A removal order is enforceable if it has come into force and is not stayed.

48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

Effect

Conséquence

(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable. (My emphasis.)

(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent. (Je souligne.)

[32] Moreover, the Court now has the benefit of the Federal Court of Appeal's recent decision in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (*Baron*), which involved a judicial review of the exercise of an enforcement officer's discretion not to defer a family's removal to Argentina pending the determination of an outstanding H&C application.

[33] In *Baron*, Justice Nadon confirmed: (1) the standard of review of an enforcement officer's decision to refuse to defer is assessed on the standard of reasonableness; (2) the scope of an enforcement officer's discretion to defer is limited; and (3) the gauge for the assessment of serious issue on a stay application is not the lower standard of the issue not being frivolous or vexatious but rather the higher threshold of whether the issue raised is fairly arguable – has a chance of success, i.e. the judge must go further and closely examine the merits of the underlying application (see *Baron*, at paragraph 67).

[34] As to the scope of an enforcement officer's discretion to defer what Justice Nadon referred to in his decision in *Simoes v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936 and adopted what his colleague Justice Pelletier wrote in *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682, when both were member of this Court. I produce paragraphs 49, 50 and 51 of Justice Nadon's reasons in *Baron*, above:

49 It is trite law that an enforcement officer's discretion to defer removal is limited. I expressed that opinion in *Simoes v. Canada (M.C.I.)*, [2000] F.C.J. No. 936 (T.D.) (QL), 7 Imm.L.R. (3d) 141, at paragraph 12:

[12] In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and pending H

& C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system. For instance, in this case, the removal of the Applicant scheduled for May 10, 2000 was deferred due to medical reasons, and was rescheduled for May 31, 2000. Furthermore, in my view, it was within the removal officer's discretion to defer removal until the Applicant's eight-year old child terminated her school year.

50 I further opined that the mere existence of an H&C application did not constitute a bar to the execution of a valid removal order. With respect to the presence of Canadian-born children, I took the view that an enforcement officer was not required to undertake a substantive review of the children's best interests before executing a removal order.

51 Subsequent to my decision in *Simoës, supra*, my colleague Pelletier J.A., then a member of the Federal Court Trial Division, had occasion in *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682 (F.C.), in the context of a motion to stay the execution of a removal order, to address the issue of an enforcement officer's discretion to defer a removal. After a careful and thorough review of the relevant statutory provisions and jurisprudence pertaining thereto, Mr. Justice Pelletier circumscribed the boundaries of an enforcement officer's discretion to defer. In Reasons which I find myself unable to improve, he made the following points:

- There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
- The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.
- In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety. (My emphasis.)

- Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.

[35] In summary, the limited discretion the enforcement officer has under section 48 of IRPA relates to when removal is to take place, not whether it will take place. The jurisprudence has identified relevant factors which may affect the timing of the removal such as impediments to traveling and other factors affected by those travel arrangements. The factors affecting the timing of a removal will vary according to the circumstances; new factors not yet recognized by the jurisprudence may be relevant in a particular situation (see *Ramada v. Canada (Solicitor General)*, [2005] F.C.J. No. 1384), where my colleague Justice O'Reilly described good reasons to defer under the umbrella of the phrase "compelling personal circumstances".

Application to this case

[36] For the reasons expressed below, I am of the view the Applicant's removal to Somalia should be stayed until a decision has been made whether leave is to be granted in respect of the enforcement officer's decision not to defer removal, and if leave is granted, until the judicial review in respect of that decision is decided.

(a) Serious issue

[37] I see, at least, the following serious issues as being fairly arguable arising from the Enforcement Officer's decision.

1. Whether, the new travel arrangements decided by the Ministers have made Officer Beck's decision to defer moot or redundant. This serious question arises because

Officer Beck relied upon the Delegate's risk analysis. That risk analysis was largely premised on Mr. Ali being able to obtain protection in Somaliland. See the Delegate's decision (Applicant's motion record, pages 56 to 58).

2. Are the travel and removal arrangements put into place for Mr. Ali's removal compatible with the principles of fundamental justice guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*, which incorporates the principles of fundamental justice. See *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3. In that case, Mr. Suresh was like Mr. Ali a convention refugee in respect of whom a danger opinion had been obtained so that he could be returned to the country which had persecuted him. This serious question arises because I have no evidence as to the kinds of arrangements have been made once he has landed in Bossaso. The Minister's Delegate recognized Mr. Ali has no family in Somalia and will face difficulties in establishing himself in the north of that country. What kind of assistance will actually be available to Mr. Ali upon his return? Have the Canadian authorities contacted the UNHCR and other humanitarian organizations to ensure he will be safely received in Bossaso? Do the Ministers have an obligation to ensure his safe return to Somalia? Have they discharged that duty?
3. Did the Enforcement Officer misunderstand the nature and scope of his discretion to defer in appropriate circumstances or fetter his discretion? This serious question arises because the decision-maker held the view the Danger opinion "superseded any risk Mr. [Ali] faces upon his return to Somalia" and ruled he could not grant a deferral until the

determination of a risk assessment, or until country conditions change because in his words “he was not presented with an alternative date of removal” and if he granted the stay, “the deferral would be for a indefinite period of time”.

4. Did the Enforcement Officer misconstrue the evidence before him?

(b) Irreparable harm

[38] The Applicant has established irreparable harm through the affidavit evidence recited above. He has established a personalized risk linked to his father’s political activities and his mixed lineage (Isaac and Daroud ancestry). That evidence shows his life, liberty and safety, on a balance of probabilities, are at risk (see *Aden*, at paragraph 5).

(c) Balance of convenience

[39] In the circumstances, the balance of convenience favours Mr. Ali. The irreparable harm he faces if returned to Somalia (or some parts of it) outweighs his being removed notwithstanding he has been found to be a danger to the public. He is currently incarcerated and has been for close to 20 months. I appreciate Mr. Ali is entitled to statutory detention reviews and has sought release on condition albeit unsuccessfully.

[40] For these reasons, the requested stay is granted.

[41] I direct that a copy of these reasons be placed on each file referred to as Dockets on page one of these reasons for order and order. To be clear I limit my grant of stay to IMM-4721-09 only.

ORDER

THIS COURT ORDERS that the Applicant's removal to Somalia and in particular to Bossaso in Puntland, a region of Somalia, is stayed until a decision has been made by this Court, whether leave will be granted in IMM-4721-09 and, if granted, until the judicial review is decided.

"François Lemieux"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: IMM-3998-09, IMM-4664-09 and IMM-4721-09

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PLACE OF HEARING: Ottawa, Ontario

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AND ORDER:** Lemieux J.

DATED: October 1, 2009

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