

Federal Court



Cour fédérale

Date: 20170106

Docket: IMM-2415-16

Citation: 2017 FC 20

Ottawa, Ontario, January 6, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

DAHIR MOHAMED OMAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Dahir Mohamed Omar seeks judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB]. The RPD found that Mr. Omar was neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD also concluded pursuant to s 107(2) of the IRPA that Mr. Omar's refugee claim had no credible basis.

[1] Given the deference owed to the RPD's assessment of a refugee claimant's credibility, and the numerous instances it identified of uncorroborated, inconsistent, incoherent and implausible evidence, the RPD's rejection of Mr. Omar's refugee claim was reasonable. However, there was at least some evidence before the RPD that was potentially capable of establishing that Mr. Omar was a Somali national, and that he had a well-founded fear of persecution in Somalia. The RPD's finding that Mr. Omar's refugee claim had no credible basis was therefore unreasonable.

II. Background

[2] Mr. Omar's claim for refugee status in Canada was based on the following assertions. He is 24 years old, a citizen of Somalia, and a member of the Sheekhaal clan. He fled to Mogadishu due to problems he encountered with Al-Shabaab and his father's former business partner. He then moved to Nairobi, Kenya in April 2012, where he remained until he came to Canada on February 4, 2016. He travelled to Canada using a false passport with the assistance of a smuggler whom he paid \$12,000. His family, including his wife, mother, daughter and siblings, have all lived in Kenya since 2012.

[3] Mr. Omar testified before the RPD that he continues to fear Al-Shabaab and his father's former business partner. He said that Al-Shabaab had killed his father, and were trying to force him to sign his father's property over to them. Mr. Omar submitted letters of support from his mother and uncle, and produced one identity witness. He did not provide any further documentation to confirm his identity or to substantiate his allegations of persecution.

[4] The RPD heard Mr. Omar's refugee claim on May 5, 2016, and dismissed it in a decision dated May 20, 2016.

III. Decision under Review

[5] The RPD found that Mr. Omar was neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97 of the IRPA. The determinative issues were identity and credibility. The RPD also concluded that Mr. Omar's claim had no credible basis, thereby denying him an appeal to the Refugee Appeal Division [RAD] of the IRB.

[6] The RPD made several adverse findings concerning Mr. Omar's identity and credibility. These included the following:

- (a) Mr. Omar offered no evidence to support his assertion that he worked for his father's business or that his father owned the business;
- (b) Mr. Omar said that he was diabetic and suffered from numerous ailments, but he provided no evidence of medical treatment. He claimed to be sharing insulin with another person because he could not afford his own, yet he also claimed to have spent \$12,000 to travel from Kenya to Canada;
- (c) Mr. Omar did not offer a reasonable explanation for failing to obtain evidence in support of his claim, particularly given that he was represented by counsel who had been in contact with Mr. Omar's family in Kenya to obtain two letters of support;
- (d) Mr. Omar did not make reasonable efforts to obtain documents to establish his identity from Somalia, where he said he had resided for 20 years, or from Kenya,

where he had resided for three years, and where his immediate family continued to live;

- (e) The two letters confirming Mr. Omar's story that were said to be written by his mother in Kenya and his uncle in Somalia were entitled to little weight because the RPD "found the claimant to not be credible." The letters could not be authenticated, were "untested and unsworn", and "did not remedy the [RPD's] other credibility concerns";
- (f) The testimony offered by Mr. Omar's identity witness was consistent with his story, but entitled to little weight because the witness met Mr. Omar only once in February 2016, and claimed to have known his family in Somalia in 1988, before Mr. Omar was born;
- (g) While Mr. Omar could speak the Somali language and spoke "reliably and knowledgeably" about Somalia, this was insufficient to establish his identity;
- (h) There was an inconsistency between the dates on which Mr. Omar said he left Somalia and the date on which he said his daughter was born; and
- (i) Mr. Omar's claim that his smuggler took care of all matters relating to his customs declaration and handled all interactions with Canadian border officials was implausible.

[7] The RPD did not accept Mr. Omar's explanation that inconsistencies in his narrative resulted from bad memory, an inability to remember certain dates, or a psychological or mental condition for which he provided no evidence. The RPD attributed these inconsistencies to a lack

of trustworthiness and reliability. The RPD held that Mr. Omar's claims were incoherent, uncorroborated by objective evidence, and not credible.

[8] The RPD concluded as follows:

Based on the totality of the evidence, the [RPD] finds on a balance of probabilities that there's insufficient persuasive evidence before the panel with respect to the claimant's identity, nationality or any of his allegations. The claimant has not established his identity either by documents or by way of his testimony. The claimant does not know who he is or where he is from. The [RPD] does not believe any of his allegations and does not know where he has been living during the central elements of his allegation.

The [RPD] is aware that the claimant does suffer from a serious medical health condition and is likely here in Canada to receive medical care and not because he is in need of refugee protection.

As the [RPD] has found for the previous reasons that there was no credible or trustworthy evidence upon which the claimant could have been determined to be a Convention refugee or a person in need of protection, the panel also finds that subsection 107(2) of the *IRPA* applies and that there is no credible basis for this claim.

IV. Issues

[9] This application for judicial review raises the following issues:

- A. Were the RPD's assessments of Mr. Omar's identity and credibility reasonable?
- B. Did the RPD reasonably conclude that Mr. Omar's refugee claim had no credible basis?

V. Analysis

A. *Were the RPD's assessments of Mr. Omar's identity and credibility reasonable?*

[10] The RPD's assessment of a refugee claimant's credibility is a factual determination within the "heartland" of the RPD's jurisdiction, and is subject to review by this Court against the standard of reasonableness (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at para 26; *Eze v Canada (Citizenship and Immigration)*, 2016 FC 601 at para 12 [*Eze*]). It must be afforded a high degree of deference (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 46). The Court will intervene only if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[11] Mr. Omar argues that the RPD's assessment of his credibility did not take into account the totality of the evidence. He says that refugee claimants are not required to provide documentary evidence, although he acknowledges that the RPD is entitled to documents that "it is reasonable to expect the claimant to have", and to a reasonable explanation if those documents are not available. Mr. Omar states that his explanations were reasonable and should have been accepted by the RPD.

[12] In addition, Mr. Omar argues that the RPD unreasonably accorded little weight to the letters of support from his mother in Kenya and uncle in Somalia on the ground that it had already rejected his credibility. He also says that it was unreasonable for the RPD to make an adverse credibility finding because he could remember some dates but not others. He says it was

“unduly harsh” for the RPD to speculate what border officials might ask persons seeking to enter Canada. He also challenges the RPD’s decision to accord little weight to his identity witness’ testimony because she was not in Somalia at the same time as Mr. Omar.

[13] The Respondent argues that identity is a central element of a refugee claim, and must be established on a balance of probabilities. The Respondent says that Mr. Omar is simply asking this Court to re-weigh the evidence in his favour. The Respondent maintains that it was reasonable for the RPD to place little weight on two unsworn and untested letters of support from people alleged to be Mr. Omar’s mother and uncle, and that the RPD’s other credibility findings were reasonable.

[14] I agree with Mr. Omar that the RPD should not have reduced the weight it accorded to the supporting letters from family members on the ground that it had already found him to lack credibility (*Chen v Canada (Citizenship and Immigration)*, 2013 FC 311; *Tshibola Kabongo v Canada (Citizenship and Immigration)*, 2012 FC 313 at para 11). However, this was only one of many deficiencies that the RPD identified in the testimony and documents Mr. Omar offered in support of his claim. Given the deference owed to the RPD’s assessment of a claimant’s credibility, and the numerous instances it identified of uncorroborated, inconsistent, incoherent and implausible evidence (see paragraph 7, above), I am unable to find that the RPD’s decision to reject Mr. Omar’s refugee claim as lacking in credibility falls outside the range of possible, acceptable outcomes.

B. *Did the RPD reasonably conclude that Mr. Omar's refugee claim had no credible basis?*

[15] Mr. Omar argues that the RPD accepted many aspects of his claim, and it cannot therefore be said that the claim had no credible basis at all. The RPD found that he could speak Somali, that he was familiar with Somalia's geography, and that his narrative was consistent with the two letters of support and the testimony of his identity witness. The RPD accorded little weight to the letters of support and to the testimony of the identity witness, but did not reject this evidence in its entirety. Mr. Omar notes that the threshold for a finding that a refugee claim has no credible basis is very high (*Rahaman v Canada (Citizenship and Immigration)*, 2002 FCA 89 at para 51 [*Rahaman*]).

[16] The Respondent argues that a finding of no credible basis need not be premised on a complete absence of evidence, but only on a lack of sufficient credible evidence capable of sustaining a positive determination of the claim (*Rahaman* at paras 28-30, 51; *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FCR 238 (CA) at para 8 [*Sheikh*]). The Respondent notes that this Court has previously upheld a finding of no credible basis where there was some documentary evidence, but that evidence was given limited weight and was found to be insufficient to sustain a positive determination (see, for example, *Tariq v Canada (Citizenship and Immigration)*, 2015 FC 692 at para 14).

[17] In *Linares Morales v Canada (Citizenship and Immigration)*, 2011 FC 1496, Justice de Montigny formulated the governing principle as follows (at para 25): “[t]o the extent that the panel had no credible evidence available to it by which it could grant the applicant refugee or person in need of protection status, it was entitled to find that his claim has no credible basis.”

[18] There is an important distinction to be made between credible evidence and the credibility of an applicant (*Sheikh* at para 244). As Justice Strickland explained in *Eze* (at para 26):

[T]o find that the Applicants lacked credibility is different from saying that their claim had no credible basis. The threshold for a no credible basis finding is high because it removes important procedural rights provided to claimants under the IRPA (*Wu v Canada (Citizenship and Immigration)*, 2016 FC 516 at para 12 [*Wu*]; [*Pournaminivas v Canada (Citizenship and Immigration)*, 2015 FC 1099] at para 9; [*Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 [*Behary*]] at para 58; [*Rahaman*] at para 51). The RPD must, before reaching a conclusion of no credible basis, look to the objective documentary evidence for *any* credible or trustworthy support for an applicant's claim (*Behary* at para 58; *Wu* at para 12).

[Emphasis original]

[19] In this case, the RPD did not find Mr. Omar's evidence to be wholly lacking in credibility. Instead, it found that much of it should be given little weight. This determination was heavily influenced by the RPD's general assessment of Mr. Omar's credibility. I am not persuaded that there was no credible evidence upon which Mr. Omar's refugee claim could potentially succeed. His knowledge of Somalia, his facility with the language, and the identity witness were all potentially capable of establishing that he was a Somali national. The letters of support from his family members were potentially capable of establishing that he had a well-founded fear of persecution in Somalia. The RPD's finding of no credible basis was therefore unreasonable.

VI. Remedy

[20] The parties disagree on the appropriate remedy where a Court finds on judicial review that the RPD's rejection of a refugee claim was reasonable, but the finding of no credible basis was not. Mr. Omar relies on *Pournaminivas v Canada (Citizenship and Immigration)*, 2015 FC 1099 for the proposition that the entire matter should be remitted to the RPD for redetermination by a differently-constituted panel. However, in that case Justice Boswell found at paragraph 10 that there was substantial documentary evidence that was not assessed by the RPD prior to making its no credible basis finding, and that the RPD's decision as a whole was unreasonable.

[21] In *Qiu v Canada (Citizenship and Immigration)*, 2016 FC 740, Justice Hughes returned the matter to the RPD with a direction that an amended decision be issued with the finding of no credible basis removed. He subsequently certified the following question for appeal (*Qiu v Canada (Citizenship and Immigration)*, 2016 FC 875):

Does the Federal Court have jurisdiction under paragraph 18.1(3)(b) of the *Federal Courts Act* to issue a direction requiring the Refugee Protection Division to remove from its decision a finding that there is no credible basis for a claim, thereby granting a right of appeal to the Refugee Appeal Division, which would otherwise be precluded by paragraph 110(2)(c) of the *Immigration and Refugee Protection Act*?

[22] Pending clarification by the Federal Court of Appeal, I consider it prudent to order the usual remedy when an application for judicial review is granted in part. I will therefore remit only the question of whether Mr. Omar's refugee claim has no credible basis to a differently-constituted panel of the RPD for redetermination.

VII. Conclusion

[23] The application for judicial review is allowed in part. The RPD's finding of no credible basis is set aside, and this question alone is remitted to a differently-constituted panel of the RPD for redetermination. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed in part. The RPD's finding of no credible basis is set aside, and this question alone is remitted to a differently-constituted panel of the RPD for redetermination. No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2415-16

STYLE OF CAUSE: DAHIR MOHAMED OMAR v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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