

Federal Court



Cour fédérale

**Date: 20170508**

**Docket: IMM-4929-16**

**Citation: 2017 FC 458**

**Ottawa, Ontario, May 8, 2017**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**WELI ABDIKADIR OMAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Weli Abdikadir Omar seeks judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board. The RAD found that Mr. Omar was excluded from the protection of the Refugee Convention by virtue of the fact that he had refugee status in South Africa.

[2] I have concluded that the RAD's decision was unreasonable as it relied upon a selective reading of the country condition evidence that was before it. The Board further erred in requiring

that Mr. Omar demonstrate that he has been personally targeted for persecution in South Africa, and by applying the wrong test for state protection. Consequently, the application for judicial review will be granted.

**I. Background**

[3] Mr. Omar is a citizen of Somalia, who fled the country in 2006 after his father was killed. During the same attack, Mr. Omar was abducted, beaten, and tortured for five days by radical Islamists. After travelling through Ethiopia and Kenya, Mr. Omar arrived in South Africa in 2008, where he was accepted as a refugee. Mr. Omar operated a grocery store, first in Benoni, and then in Orange Farm.

[4] In 2012, three men entered Mr. Omar's shop and demanded money, following which they beat Mr. Omar and stabbed him in the chest. He was taken to the hospital, where he was in a coma for three days. Mr. Omar then spent a month in hospital, during which time he underwent multiple surgeries.

[5] One of Mr. Omar's attackers was arrested by the South African Police Service. Mr. Omar testified against the attacker in Court. Although Mr. Omar claims that the police told him that his attacker would be imprisoned for 25 years, he was evidently released after just two months, whereupon he returned to Mr. Omar's shop to threaten him. Mr. Omar states that he told the police about the incident, but they failed to act. Mr. Omar then moved to the Township of Orange Farm because he feared further attacks.

[6] Mr. Omar says that in 2014, xenophobic mobs started to attack Somali refugees in Orange Farm. In October of that year, Mr. Omar was loading goods from his store into his car to

avoid looting when he was attacked by such a mob. The police helped him escape, but they could not protect Mr. Omar's personal property.

[7] Mr. Omar states that he was traumatized from the 2012 incident, and that he became increasingly afraid to stay in South Africa because of his growing awareness of the xenophobia against Somali refugees in that country. Consequently, he applied for a refugee travel document from the South African government. His application was refused, and he was told that he would not get a travel document unless he paid a bribe. Rather than pay a bribe, Mr. Omar used a falsified Namibian passport to travel to Brazil. From Brazil, he travelled through the United States, arriving in Canada in February of 2016, whereupon he applied for refugee protection.

[8] Mr. Omar's eligibility to make a refugee claim was assessed at the border, and a Minister's delegate was satisfied that Mr. Omar was a citizen of Somalia, and that he had been accepted as a refugee in South Africa. The Minister's delegate was further satisfied that Mr. Omar's claim was eligible for referral to the Immigration and Refugee Board. In coming to this conclusion, the Minister's delegate stated that "[d]espite his recognition as a refugee in [South Africa], experience has shown me that South Africa is unwilling to readmit refugee claimants to the country if they have been absent from South Africa for a period longer than six (6) months. Therefore I do not believe he can be returned to that country".

[9] Mr. Omar's refugee claim was rejected by the Refugee Protection Division, which found that he was excluded from the protection of the Refugee Convention (*United Nations Convention Relating to the Status of Refugees*, 189 U.N.T.S. 150), by virtue of the fact that he continued to have status in South Africa. This decision was subsequently affirmed by the RAD.

## **II. Standard of Review**

[10] A finding that a refugee claimant should be excluded pursuant to Article 1E of the Refugee Convention involves a question of mixed fact and law, and is reviewable on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v. Zeng*, 2010 FCA 118 at para. 11, [2010] F.C.J. No. 632. That said, the test applied by the RAD with respect to the question of the availability of state protection is a question of law that is reviewable on the correctness standard: *Buri v Canada (Minister of Citizenship and Immigration)*, 2014 FC 45 at paras. 16 and 18, 446 F.T.R. 57.

## **III. Was the Board Bound by the Decision of the Minister's Delegate?**

[11] Mr. Omar submits that as a result of the principle of issue estoppel, the RPD and the RAD (collectively “the Board”) were both bound by the finding of the Minister’s delegate that he could not be returned to South Africa. I do not accept this submission.

[12] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 25, [2001] 2 S.C.R. 460 (citing *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 254, 47 D.L.R. (3d) 544), the Supreme Court of Canada held that there are three pre-conditions that must be satisfied for issue estoppel to apply. They are:

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and,
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[13] In this case, the issue decided by the Minister's delegate was not the same as the issue that was before the Board. The Minister's delegate had to decide whether Mr. Omar was eligible to have his claim referred to the Immigration and Refugee Board, whereas the Board had to decide whether Mr. Omar satisfied the definition of a "refugee" in light of Article 1E of the Refugee Convention. Article 1E excludes persons from the refugee definition if they have surrogate protection in a country where they enjoy the same rights and obligations as nationals of that country.

[14] Eligibility and exclusion are not the same thing: *Haqi v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 1246 at paras. 57 and 58, [2014] F.C.J. No. 1214, aff'd 2015 FCA 256. See also *Feimi v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325 at para. 21, [2012] F.C.J. No. 1610. I agree with the respondent that a decision that a claim is eligible for referral to the Immigration and Refugee Board is a preliminary screening decision, whereas an exclusion finding is a determination as to whether a claimant satisfies the definition of a "refugee" in light of Articles 1E or 1F of the Refugee Convention. Issue estoppel does not arise in these circumstances, and the Board was not bound by the findings of the Minister's delegate.

#### **IV. Mr. Omar's Ability to Return to South Africa**

[15] The purpose of Article 1E of the Refugee Convention is to exclude persons who do not need surrogate protection: *Zeng*, above at para. 19. In deciding whether Mr. Omar was in need of protection, the Board thus had to determine whether he enjoyed the rights and obligations of citizens of South Africa, including the right to re-enter the country.

[16] In coming to the conclusion that Mr. Omar would be able to return to South Africa, the RAD noted that the country condition information indicated that a person's refugee status in t

South Africa “remains as valid as the validity of the document [that evidences refugee status]”. In Mr. Omar’s case, his South African refugee document was valid until November 16, 2016, which post-dated both the RPD and the RAD’s decisions. Consequently, the RAD was satisfied that he continued to enjoy refugee protection in that country.

[17] Mr. Omar’s South African refugee document also noted that he would lose his refugee status in that country if he were to leave the country permanently. This was thus consistent with the finding of the Minister’s delegate that South Africa would likely be unwilling to readmit Mr. Omar, given that he had been outside of the country for more than six months.

[18] The evidence relied upon by the RAD was a statement made by a representative of the Refugee Ministries Centre (RMC). The RMC was described by the RAD as “an organization that [...] promotes fair access to documentation for refugees and asylum seekers in South Africa”. As such, the RAD found that the RMC “would more likely than not have first-hand knowledge and experience as to the validity of refugee documents”. As a result, the RAD placed substantial weight on the statement referred to above.

[19] The problem with the RAD’s reliance on the excerpt cited above is that it was only part of what the RMC had to say with respect to the ability of someone in Mr. Omar’s position to re-enter South Africa. The RMC is also quoted as stating that “it is ‘almost impossible’ to re-obtain refugee status” once it has been lost, and that “a recognized refugee’s status in South Africa can be renewed, not renewed, or even revoked altogether ‘depending on the mood of the government official’ who is assisting the refugee”.

[20] Other country condition information before the RAD indicated that if a claimant leaves South Africa without first obtaining a travel document, it was unlikely that the individual would be re-admitted to the country. The individual would then have to make a second refugee claim which would, in practice, be difficult.

[21] The RAD made no mention of this evidence, however, which calls into question its finding that Mr. Omar could return to South Africa. Having accepted that the RMC was a knowledgeable and reliable source regarding the loss and re-acquisition of refugee protection in South Africa, it was an error for the RAD to selectively rely on a small portion of that evidence without explaining why it discounted the rest of the information provided by the same organization that contradicted the RAD's conclusions: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 at para. 15, [1998] F.C.J. No. 1425.

[22] In these circumstances, I am satisfied that the RAD's finding that Mr. Omar continued to enjoy refugee protection in South Africa was unreasonable. This was not, however, the only error in the RAD's decision. Given that Mr. Omar's claim will have to be remitted to the RAD for reconsideration, it is therefore necessary to briefly identify the other errors that it committed.

**V. The Requirement that Mr. Omar be Personally Targeted**

[23] Mr. Omar submitted to the RAD that he had relinquished his rights in South Africa because of the persecution that he suffered there and his fear that he would continue to suffer xenophobic attacks if he were to return to that country.

[24] As was noted earlier, the purpose of Article 1E is to exclude persons who do not need protection under the Refugee Convention. As the United Nations High Commissioner for

Refugee notes in the “*Note on the Interpretation of Article 1E of the 1951 Convention Relating to the Status of Refugees*”, regard must also be had to whether the individual has a well-founded fear of persecution in the country where the individual has been granted refugee protection. This makes sense: if it were otherwise, an individual in Mr. Omar’s position would be denied refugee protection in Canada, while a citizen of South Africa facing the same risk would be entitled to refugee protection.

[25] Indeed, the respondent agrees that an individual will not be excluded from the protection of the Refugee Convention if they are able to show that they are at risk in the country that has recognized them to be a refugee. As a consequence, before excluding Mr. Omar under Article 1E, the Board was obliged to consider whether he had a well-founded fear of persecution in South Africa.

[26] The RAD considered this question, but found that even with the two attacks that Mr. Omar had suffered, he had not established that he had personally been the target of discrimination or xenophobic attacks. Rather, he had simply been the victim of criminal activity, which is rampant in South Africa.

[27] Not only did the evidence before the RAD show that Somali shopkeepers have been a particular target of xenophobic mobs in South Africa, Mr. Omar had himself been the victim of just such attacks. Moreover, in the case of the first attack, Mr. Omar had subsequently been personally threatened by his attacker following his release from custody. Thus, it is difficult to understand the RAD’s finding that Mr. Omar had not been personally targeted.



[28] That said, the more fundamental problem with the RAD's persecution analysis is that it is not necessary for a claimant to show that they have been personally targeted. It is enough for a claim to succeed under section 96 of *the Immigration and Refugee Protection Act*, S.C. 2001, c. 27 if a claimant can show that there is more than a mere possibility that they will be persecuted as a result of their membership in a protected group: *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 at para. 8, 57 D.L.R. (4th) 153.

## **VI. The Test for State Protection Applied by the RAD**

[29] After reviewing the evidence before it on the issue of persecution, the RAD then found that Mr. Omar had also failed to demonstrate that state protection would not be available to him if he were to return to South Africa. In coming to this conclusion, the RAD stated that "there is insufficient evidence to indicate that there is no state protection in [South Africa]".

[30] The respondent quite properly conceded that the RAD appears to have applied the wrong test for state protection in this case. A refugee claimant is not obliged to show that there is no state protection available to them in the country in issue. Rather, they need only show that the protection that they may expect to receive is inadequate: *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] F.C.J. No. 399.

## **VII. Conclusion**

[31] For these reasons, the application for judicial review is allowed. I agree with the parties that the case is fact-specific and does not raise a question for certification.

**JUDGMENT IN IMM-4929-16**

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

1. This application for judicial review is allowed and the matter is remitted to a differently constituted panel of the RAD for re-determination in accordance with these reasons.

"Anne L. Mactavish"

---

Judge

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

**DOCKET:** IMM-4929-16

**STYLE OF CAUSE:** WELI ABDIKADIR OMAR v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 3, 2017

**JUDGMENT AND REASONS:** MACTAVISH J.

**DATED:** MAY 8, 2017

**APPEARANCES:**

Michael Crane FOR THE APPLICANT

David Knapp FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Michael Crane FOR THE APPLICANT  
Barrister and Solicitor  
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of  
Canada  
Toronto, Ontario