

Federal Court



Cour fédérale

Date: 20170615

Docket: IMM-2178-16

Citation: 2017 FC 598

Ottawa, Ontario, June 15, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

AHMED ABDI MOHAMED

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review application of a decision of the Immigration and Refugee Board, Refugee Protection Division (RPD), dated April 28, 2016, denying the Applicant's claim for refugee protection made pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The RPD dismissed the Applicant's claim on the ground that he has failed to establish his identity. Stating that identity is the cornerstone of refugee

determination, the RPD went a step further in finding the claim to have no credible basis pursuant to s 107(2) of the Act.

II. Background

[2] The Applicant is known as Ahmed Abdi Mohamed. He claims to be a national of Somalia. He entered Canada from the United States [US] on November 16, 2014.

[3] The Applicant's refugee claim can be summarized as follows. The Applicant says he is a member of the Ogaden tribe and that his tribe is in dispute with a more powerful clan called the Bartire, who controls the region where he lived in Somalia. He claims that in 2009, members of the Bartire clan killed his father, took his camels, and have continued to threaten his family since. In 2010, members of the Bartire tribe returned for more camels and beat and tortured the Applicant, threatening to kill him the next time they returned.

[4] These circumstances were allegedly the impetus for the Applicant's departure from Somalia in late December 2010. The Applicant says that his family sold some livestock in order to pay for his travel to South Africa, where he remained for approximately three years. He then decided to leave South Africa as refugees were being targeted by locals. He ended up in South America and, after travelling through many countries, entered the US where he unsuccessfully sought refugee protection.

[5] After having been released from detention by the US immigration authorities, the Applicant travelled to Canada. He believes that if he returns to Somalia, he will be harmed or

killed by members of the Bartire clan. He also now believes he will be harmed by Al Shabab as he has learned that his mother has been threatened, attacked and accused by members of the Al Shabab for not paying a tax to Al Shabab.

[6] As indicated at the outset of these Reasons, the determinative issue in the RPD decision is identity. The Applicant testified before the RPD that he has never had any government-issued identification documents from Somalia. The RPD noted that this was consistent with the objective documents on Somalia. As a result, the RPD assessed the Applicant's credibility as part of the assessment of his identity, and found that the presumption of the Applicant's truthful testimony had been rebutted.

[7] The Applicant testified that he had never presented any Somali documents to anyone. The RPD then showed him a birth certificate issued by the Municipality of Mogadishu. The Applicant apologized for the mistake and said that he received the fraudulent birth certificate from a woman he stayed with in Venezuela in order to travel to the US. The Applicant testified that he lost the document on his way to the US and entered the US without any identity documents, but that he had sent a second copy of the document to a friend in South Africa for safe-keeping.

[8] The Applicant also testified that his cousin, Sarah, who lives in the US, was able to get the extra document for him and send it to him while he was detained in the US, but said that he had not instructed her to do so. The RPD questioned the Applicant as to how it was possible that

Sarah was able to obtain the birth certificate from his friend in South Africa without being instructed to do so, but he only stated he did not have the details.

[9] Sarah testified at the hearing and gave evidence that she was asked by the Applicant to obtain the document from his friend in South Africa. The RPD accepted her evidence, finding it impossible that Sarah would obtain the birth certificate at her own behest and would happen to contact the one person in South Africa who had it. The RPD also did not accept that the Applicant did not use the document in the US, as the US immigration documents suggested that he presented some documentation that led to his release. In any event, the Applicant fabricated the story on how he obtained the document, impacting his credibility.

[10] The Applicant also provided a declaration from Sarah's husband, Mr. Abdimahat, stating that the Applicant is a close family friend and that he has known him since his birth in Buale, Somalia. However, Sarah stated that her husband had never met the Applicant, and that they had only spoken on the phone after the Applicant arrived in the US. The RPD found that the Applicant obtained the false declaration to assist him while he was in custody, gave the affidavit little weight, and found it insufficient to establish the Applicant's identity.

[11] The RPD similarly found the declaration of Mr. Abdullahi - which was included with the declaration of Mr. Abdimahat - insufficient to establish the Applicant's identity, as he declared the exact same thing that Mr. Abdimahat had declared, specifically that he and the Applicant were friends and that he was present for his birth in Buale.

[12] The RPD found that Sarah's letter and testimony were insufficient to establish the Applicant's identity, considering the Applicant's improvised testimony explaining how she obtained his birth certificate, and that Sarah could not corroborate the Applicant's events in Somalia nor did she testify that she had ever seen the Applicant in Somalia. It also gave little weight to four other supporting documents: two letters from Somalia Resettlement Services of Faribault Minnesota and the Somali Association of South Africa, and two declarations from the Manitoba Somali Association and its Vice-President, Mr. Abdi Jiban Elmi. The RPD found that these documents provided no details as to how they were able to establish the identity of the Applicant, and were generally vague. For example, the declaration from Mr. Elmi stated only that a group of elders concluded that the Applicant is Somali.

[13] The RPD further gave little weight to a declaration from someone named Aditrizak Adam who stated he knew the mother of the Applicant but had no knowledge of the Applicant himself, stating that he had had no contact with the Applicant prior to his coming to Canada.

[14] Finally, the RPD found that the Applicant's mother's testimony, generally corroborating the Applicant's story about his departure from Somalia, was not sufficient to establish the Applicant's identity independent of any other corroboration, taking into account the difficulty with the Applicant's credibility.

[15] As a result, the RPD held that the Applicant's failure to establish his identity on a balance of probabilities was determinative of his refugee claim. It also held, pursuant to s. 107(2) of the Act, that his claim had no credible basis.

[16] The Applicant submits that the RPD decision must be set aside on the basis that it is unreasonable on both counts. First, on the issue of identity, the Applicant contends that the RPD unreasonably placed weight on the fraudulent birth certificate and the accompanying testimony as a determinative factor, when that document was never presented by him as part of his refugee claim. The Applicant states that this document was provided to the RPD not by him but by the Minister. As such, it cannot be held against him that he used the document to prove his identity, when he did not. It is an error for the RPD, he says, to base a negative credibility finding on a claimant's use of false documents to travel to Canada, which a claimant cannot be faulted for.

[17] The Applicant further submits that he provided a reasonable explanation, pursuant to section 106 of the Act, as to why identity documents from Somalia were not available. However, he says that his explanations were dismissed in an arbitrary manner. Section 106 provides that the RPD must take into account, with respect to the credibility of a refugee claimant, whether the claimant possesses acceptable documentation establishing his/her identity and, if not, whether the claimant has provided a reasonable explanation for the lack of documentation or has taken reasonable steps to obtain it.

[18] The Applicant claims, in this respect, that the RPD did not apply the presumption of truthfulness to his testimony, and incorrectly rejected documents because they were "vague" or did not "explain how the association went about to ascertain the identity of the [Applicant]". In particular, he says that the RPD's rejection of the letter from the Manitoba Somali Association was unreasonable, as the National Documentation Package states that such associations conduct

interviews with the client and can establish identity based on the person's accent and testimony, and that they will not assist individuals that they do not believe are Somali.

[19] Finally, the Applicant contends that the RPD erred on identity because he succeeded in a credible fear determination in the US, where the US Department of Homeland Security [US DHS] determined his identity with "a reasonable degree of certainty" based on the "Applicant's own credible statements".

[20] Second, with respect to the no credible basis finding, the Applicant contends that in order to make a no credible basis finding, there must not be *any* credible or trustworthy evidence. However, in this case, he says the RPD assigned "little weight" to many of the documents he provided but did not assign them "no weight" which is required for a no credible basis finding. For example, he notes that the RPD acknowledged that his mother's testimony was generally corroborative, but gave it little weight due to other difficulties with his credibility. He further notes that the RPD's conclusion was that he had not presented "sufficient credible or trustworthy evidence" to establish identity, which, he says, does not meet the high burden of a finding of no credible basis.

III. Issues and Standard of Review

[21] This case raises the following two issues:

- a) Whether the finding that the Applicant has failed to establish his identity on a balance of probabilities is reasonable; and

- b) Whether the finding that the Applicant's refugee claim has no credible basis is reasonable.

[22] There is no dispute between the parties that the applicable standard of review in this case is reasonableness. This means that the Court will only interfere with the RPD decision if it is satisfied that the decision does not fall within a range of possible and acceptable outcomes or fit with the principles of justification, transparency and intelligibility (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

IV. Analysis

A. *The Finding on Identity*

[23] I find that it was reasonably opened to the RPD to conclude that the Applicant has failed to establish his identity on a balance of probabilities. First, with respect to the fraudulent birth certificate, I agree with the Respondent that the RPD did not impugn the Applicant's credibility because he used a fraudulent document to prove his identity, but because he was untruthful during his refugee claim with respect to how the document was obtained and used in the US.

[24] As for the adverse credibility finding drawn by the RPD as a result of the inconsistency in the Applicant's testimony with that of his cousin Sarah, I see no reason to interfere with it. Indeed, the Applicant was repeatedly asked how Sarah knew to get the document from his agent friend in South Africa, and repeatedly answered that he did not know the details, but that he had not ask her to do it (Certified Tribunal Record, vol. 2, at pp. 446, 448 and 466). In contrast, Sarah

testified that while the Applicant was in detention in the US, he contacted her and told her to get the birth certificate from that friend in South Africa. Sarah testified that the Applicant told her to contact his friend in South Africa, which she did (Certified Tribunal Record, vol. 2, at p. 406).

[25] I believe the RPD's adverse credibility findings regarding Sarah's husband's affidavit, Mr. Abdimahat, were also reasonable. The Applicant has attempted to explain this inconsistency in his affidavit on judicial review, stating that Sarah's answer that the Applicant and her husband had never met was in reference to meeting in the US and not in Somalia. However, her evidence was very clear on that point. When asked whether her husband knew the Applicant before they spoke in the US, she answered: "[t]hey knew each other, but they have never met. They have never talked, because me and my husband got married in South Africa, so they knew about each other but they never had a conversation" (Certified Tribunal Record, vol. 2, at p. 408). As a result, I believe it was reasonable for the RPD to conclude that the Applicant obtained a false declaration from Sarah's husband - declaring that he was present at his birth in Somalia (Certified Tribunal Record, vol. 1, at p. 299) - in order to bolster his claim. The same can be said of the co-declarant, Mr. Abdullahi, whose relationship to the Applicant was never explained.

[26] The Applicant says that the RPD did not apply the presumption of truthfulness to the Applicant's testimony, and incorrectly rejected the supporting letters from Somali organizations because they were "vague" or did not "explain how the association went about to ascertain the identity of the Applicant". Here I agree with the Respondent that the RPD did not find that these documents were not credible, but that they lacked probative value because they did not explain how the writers established the Applicant's identity (Certified Tribunal Record, vol. 1, at p. 286, 289 and 316). I find that it was reasonably opened to the RPD to conclude as it did on that point.

[27] As for the inference drawn by the RPD that the Applicant had provided the US DHS with the fraudulent birth certificate to establish identity, I find it unreasonable because the DHS documents show that the officer was satisfied of the Applicant's identity not on the basis of any documentary evidence presented, which was an available box for the officer to check, but because of the Applicant's testimony (Certified Tribunal Record, vol. 1, at p.159). However, I agree with the Respondent that the RPD was not required to defer to the decision of the US DHS, as the Applicant here presented additional and conflicting evidence to the RPD and because most of the Applicant's evidence before the RPD post-dates that decision. In addition, and notably, a letter dated January 15, 2015 indicates that the US DHS was not prepared to grant the Applicant parole from detention because he had not established his identity (Certified Tribunal Record, vol. 1, at p.178).

[28] Finally, with respect to the Applicant's testimony, I believe it was open and reasonable for the RPD to conclude that her testimony was insufficient to offset the RDP's credibility concerns and establish the Applicant's identity without any further corroboration. As highlighted by Justice Snider in *Su v Canada (Citizenship and Immigration)*, 2012 FC 743 at para 5, "a decision of the [RPD] with respect to identity is exclusively fact driven". As such, it was for the RDP to conclude whether or not the Applicant had established his identity on a balance of probabilities (*Ntsongo v Canada (Citizenship and Immigration)*, 2016 FC 788, at para 23; *Yip v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1285, at para 7). In the present case, the RDP found that the Applicant had not met his onus. Thus, amid a finding that the RDP's decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, this Court cannot intervene.

[29] My conclusion that the RPD identity finding is within the scope of reasonableness does not save the RPD decision however as I am of the view that the RPD committed a reviewable error in determining that that the Applicant's refugee claim has otherwise no credible basis.

B. *The No Credible Basis Finding*

[30] Paragraph 107(2) of the Act reads as follows:

| No credible basis | Preuve |
|---|---|
| (2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim. | (2) Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l'absence de minimum de fondement de la demande. |

[31] A finding pursuant to subsection 107(2) of the Act has some significant consequences as it deprives those concerned of an appeal to the Refugee Appeal Division with the benefit of a statutory stay. This is why the threshold for such a finding is a high one as it can only be reached “when there is no trustworthy or credible evidence that could support the recognition of the claim” (*Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89, at para 51 [*Rahaman*]). It is a finding “that cannot be either a catch-all, a throwaway line or a summary of insufficiency and weighing of evidence pros and cons” (*Mahdi v Canada (Citizenship and Immigration)*, 2016 FC 218, at para 10 [*Mahdi*]).

[32] Recently, in *Boztas v Canada (Citizenship and Immigration)*, 2016 FC 139 [*Boztas*], Mr. Justice Brown discussed the principles with respect to no credible basis findings as follows:

[11] This test to meet on judicial review of a no credible basis finding is a high one, as stated by Rennie J. (as he then was) in *Levario v Canada (Minister of Citizenship and Immigration)*, 2012 FC 314 [*Levario*]:

[18] The threshold for a finding that there is no credible basis for the claim is a high one, as set out in *Rahaman*, at para 51:

...As I have attempted to demonstrate, subs. 69.1(9.1) requires the Board to examine all the evidence and to conclude that the claim has no credible basis only when there is no trustworthy or credible evidence that could support a recognition of the claim.

[19] Thus, if there is *any* credible or trustworthy evidence that could support a positive determination the Board cannot find there is no credible basis for the claim, even if, ultimately, the Board finds that the claim has not been established on a balance of probabilities.

[emphasis in original]

[12] In this case, there was indeed credible or trustworthy evidence that could support a positive determination and that was in fact accepted by the RPD and given some weight, namely:

A. Evidence relating to the Applicant's identity and the persecution and discrimination in Turkey of those of his particular ethnicity and religion. The RPD accepted the documentary evidence and the fact that the Applicant was Kurdish and of the Alevi faith.

B. Evidence from letters by professionals was given "very little weight" by the RPD. These letters were written by the Applicant's doctor and his lawyer in Turkey. This evidence indicated that the Applicant had received treatment for his injuries from his family doctor on March 21, 2012, and on June 15, 2012. According to the doctor's letter, the Applicant reported to his doctor that he was injured after being beaten and tortured by the police. The letter from the Applicant's lawyer stated that this lawyer attempted to assist the Applicant in securing his release and the return of his passport in relation

to the Applicant's June 2012 detention, to no avail. The RPD gave little evidentiary weight to these letters, but did not say that it gave the letters no weight at all, as would be required for a "no credible basis" finding.

[my emphasis]

[13] With this law and these findings in mind, I am driven to conclude that the RPD acted unreasonably, and I might add incorrectly, in applying the legal test governing the application of the no credible basis provision as set out above.

[33] As in *Boztas*, the RPD here only very briefly addressed the no credible basis finding at the end of the decision, and nowhere else, stating:

[26] The Panel further finds that there is no credible basis to the claim pursuant to Section 107(2) of the *Immigration and Refugee Protection Act*. As identity is the cornerstone of refugee determination, the claimant's failure to establish his identity results in the Panel concluding that there is no credible or trustworthy evidence on which it could have made a favourable decision.

[34] Also as in *Boztas*, the RPD here did not give no weight to or otherwise reject the letters and declarations from Somali organizations, but gave them little evidentiary weight based on their lack of probative value, finding them insufficient to prove identity. Likewise, the RPD did not find that the Applicant's mother or cousin were not credible themselves, but gave their evidence little weight due to credibility concerns with respect to the Applicant's own evidence. Each of these pieces of evidence supported the Applicant's story.

[35] The Respondent on this point cites *Saleem v Canada (MCI)*, 2008 FC 389 for the proposition that the Federal Court has ruled that where a refugee claimant has failed to establish identity, it is reasonable for the RPD to determine that the claim has "no credible basis". That

case does not review or analyze the jurisprudence for no credible basis findings, nor does the applicant in that case challenge the RPD's finding of no credible basis. Rather, the issue in that case was whether the RPD's conclusion that the claimant failed to establish his identity was reasonable and whether procedural fairness was breached.

[36] While there may be cases where the RPD can reasonably conclude that the claimant has failed to establish identity and that there is no credible basis for the claim, the finding must, in my view, still be consistent with *Boztas*, *Levario* and *Rahaman*. For instance, in *Mahdi*, Justice Phelan found that the RPD erred in making a no credible basis finding after finding the applicant had failed to produce sufficient credible evidence of identity. So did Justice Boswell in *Pournaminivas v Canada (Citizenship and Immigration)*, 2015 FC 1099, where he concluded that the RPD's negative credibility findings were reasonable, but that a no credible basis finding was not.

[37] For these reasons, as Justice Brown did in *Boztas*, I find that the RPD unreasonably, if not incorrectly, applied the legal test governing the application of paragraph 107(2) of the Act.

[38] The Applicant's judicial review application will be granted accordingly.

[39] The Applicant is proposing the following certified question:

“Must the Refugee Protection Division, under Immigration and Refugee Protection Act section 107(2), before deciding that there is no credible basis for a refugee protection claim on the ground of failure to establish identity, determine that there was no credible or trustworthy evidence on which the Division could have made a favourable decision on the identity of the claimant?”

[40] The Respondent opposes certification.

[41] I am not satisfied that the proposed question is a serious question of general importance and of broad significance which would be dispositive of the appeal. More particularly, I am not satisfied that the proposed question transcends the interests of the parties to the litigation (*Zazai v Canada (Minister of Citizenship and Immigration)* 2004 FCA 89 at para 11).

[42] Therefore, no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The decision of the Immigration and Refugee Board, Refugee Protection Division, dated April 28, 2016, is set aside and the matter is remitted to the Refugee Protection Division for re-determination by a different panel member in accordance with these Reasons;
3. No question is certified.

“René LeBlanc”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2178-16

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

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DATED: JUNE 15, 2017

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