Federal Court  Cour fédérale

Date: 20180502

Docket: IMM-3408-17

Citation: 2018 FC 471

Ottawa, Ontario, May 2, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

IRSHAD MOHAMED AHMED

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a danger opinion dated June 14, 2017 rendered by a Minister's Delegate pursuant to paragraph 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Minister's Delegate came to two conclusions: (1) that the Applicant was inadmissible on grounds of serious criminality because the Applicant constitutes a danger to the public in Canada [the Danger Analysis]; and (2) that his

return to Somalia would be in accordance with the *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [the *Charter*] as required by *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*] [the Risk Analysis].

[2] For the reasons that follow, judicial review is granted due to procedural unfairness.

II. Background

[3] The Applicant is a Somali citizen who came to Canada in 1990 from Somalia when he was seven years old. In 1995, he was granted permanent resident status.

[4] The Applicant has an extensive criminal history involving arms and drug dealing: since the age of sixteen (he is now thirty) he has accumulated thirty-six criminal convictions including, but not limited to, extortion, forcible confinement, trafficking in drugs and firearms (a sentencing judge referred to him as a "merchant of death"), assault, breach of court orders and probation, obstructing a peace officer, public mischief, firearm possession (multiple counts), and conspiracy to commit an indictable offence (three counts). It appears he made his living through crime since he was sixteen. At the time of the Minister's Delegate's decision, the Applicant was in prison serving his most recent sentences of seven years five months, five years concurrent, and four years concurrent and eighteen months on two charges, also concurrent.

[5] In 2003, the Applicant was reported under section 44 of IRPA for serious criminality, based on convictions for extortion, forcible confinement, and pointing a firearm. A deportation

order was issued. In 2006, Canada Border Services Agency [CBSA] put the Applicant on notice respecting a danger opinion process under paragraph 115(2)(a) of the IRPA. Subsection 115 of IRPA states:

Principle of Non-refoulement	Principe du non-refoulement
Protection	**Principe**
115(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	115(1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
Exceptions	**Exclusion**
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire:
(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and	b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses

severity of acts committed or of danger to the security of Canada.	actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

[6] However, in 2010, instead of issuing a danger opinion, a Minister's Delegate issued the Applicant a warning letter.

[7] That warning went unheeded.

[8] In 2014, the Applicant was again reported under section 44 of IRPA for serious criminality, and in 2015 a new danger opinion process began.

[9] The Applicant was given notice of the fact that a danger opinion was in process and that he might be returned to Somalia, notwithstanding his refugee status. Through counsel, he filed detailed submissions saying why this should not happen, dated September 25, 2015.

[10] A report recommending his return to Somalia was then prepared by an analyst [the Analyst's Report] dated September 20, 2016. This Report recommended the Applicant's removal.

[11] A copy of the Analyst's Report was provided to the Applicant with an invitation to reply, which he did through counsel, by letter dated November 2, 2016.

[12] On June 14, 2017, the Minister's Delegate issued the report under review. As noted, the Delegate's Danger Analysis found that the Applicant was inadmissible on grounds of serious criminality as someone who constitutes a danger to the public in Canada.

[13] The Danger Analysis portion of the report was not challenged by the Applicant either in his written memorandum or at the hearing of this judicial review. Therefore, the Risk Analysis portion of the report concerning the Applicant being returned to Somalia is the subject of this judicial review.

[14] One of the documents considered by the Minister's Delegate in making her Risk Analysis per *Suresh* was identified through online research on the United Nations High Commissioner for Refugees' [UNHCR] Refworld website, found http://www.refworld.org/.

[15] The Minister's Delegate did not give the Applicant a copy of this report, nor did she provide him with an opportunity to reply. This constituted a breach of the duty of disclosure; therefore judicial review must be granted. Because the Applicant did not challenge the Danger Analysis finding made under paragraph 115(2)(a) of IRPA, it binds the Applicant; the redetermination ordered will deal with the Risk Analysis.

III. Issue

[16] The determinative issue is the reliance on and non-disclosure to the Applicant of a document the Minister's Delegate located on the Internet, which document led her to conclude that the Applicant was a member of a sub-clan of one of the "noble clans" in Somalia. Given this

information, the Minister's Delegate concluded the Applicant was at reduced risk particularly in Mogadishu – to which he would be removed – where his sub-clan was in fact dominant. This gives rise to an issue of procedural fairness.

IV. Standard of Review

[17] Questions of procedural fairness are reviewed on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79). In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[18] The Supreme Court of Canada in *Suresh* stated that the *Charter* requires relevant decision-makers to comply with certain procedural steps when undertaking the risk analysis in removing a refugee such as the Applicant:

> 122 We find that a person facing deportation to torture under s. 53(1)(b) must be informed of the case to be met. Subject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents, this means that the material on which the Minister is basing her decision must be provided to the individual, including memoranda such as Mr. Gautier's recommendation to the Minister. Furthermore, fundamental justice requires that an opportunity be provided to respond to the case presented to the Minister. While the Minister accepted written submissions from the appellant in this case, in the absence of access to the material she was receiving from her staff and on which she based much of her decision, Suresh and his counsel had no knowledge of which factors they specifically

> needed to address, nor any chance to correct any factual inaccuracies or mischaracterizations. Fundamental justice requires that written submissions be accepted from the subject of the order after the subject has been provided with an opportunity to examine the material being used against him or her. The Minister must then consider these submissions along with the submissions made by the Minister's staff.
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> 123 Not only must the refugee be informed of the case to be met, the refugee must also be given an opportunity to challenge the information of the Minister where issues as to its validity arise. Thus the refugee should be permitted to present evidence pursuant to s. 19 of the Act showing that his or her continued presence in Canada will not be detrimental to Canada, notwithstanding evidence of association with a terrorist organization. The same applies to the risk of torture on return. Where the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances.

V. Analysis

[19] As noted, the determinative issue is the non-disclosure of a report on the relative safety of the Applicant as a member of his sub-clan, which report was discovered by the Minister's Delegate through internet research. The relevant background is as follows.

[20] The Analyst's Report first raised the Applicant's clan membership. The Analyst reported:

> Mr. Ahmed is a member of the Sheikhal clan which is considered a minority clan […]. However, the documentary evidence shows that clan protection has become much less of an issue and that people returning from abroad do not face particular risks in regard to clan affiliation. The CBSA sent the Analyst's Report to the Applicant's counsel for response.

[21] In response, Applicant's counsel stated the following regarding the issue of clan membership:

> In connection with the document produced by the United Kingdom Home Office, "Country Information and Guidance, Somalia: Security and Humanitarian situation in South and Central Somalia" it is noted that at section 3 of that report which deals with ordinary civilians returning to Somalia that it states at section 3.1.3 that, "the situation might be otherwise for a person of a minority clan who has no clan or family support, not being in receipt of remittances from abroad and who has no real prospect of securing access to a livelihood in Mogadishu. Such people would be at real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards." This is the exact situation for Mr. Ahmed. He is from a minority clan, has no clan or family support and given the fact that he has not lived in Mogadishu since he was a young child does not speak the Somali language with fluency, he would likely have no real prospect of securing access to livelihood in Mogadishu and would be placed in a situation where he would live in conditions that fall well below acceptable standards.
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> [Emphasis added.]

[22] The Applicant stated that he is from a minority clan and "has no clan". This response elevated the issue of his clan membership for the Minister's Delegate to consider. In my view it was an important part of his submissions.

[23] The Minister's Delegate accordingly investigated his assertion. I do not take fault with doing that given the Applicant's assertions.

[24] As a result of online research, the Minister's Delegate identified a document on the UNHCR's http://www.refworld.org/ website that stated that members of the Applicant's sub-clan dominated Mogadishu and were at reduced risk. She stated:

I note that Mr. Ahmed belongs to the Sheikhal clan. Counsel notes it is a minority clan, but it is also a sub-clan of one of the five noble clans, the Hawiye […]. As Mr. Ahmed is from Mogadishu and will likely opt to return there, I note the following on Hawiye in Mogadishu:

> It was added by the international NGO working in S/C Somalia (B) that the position of the minorities is still precarious in the sense that you would need protection against for instance criminals. If you are rich this is easy to solve, if you are poor it's different. It is also important to note that even if you belong to a major Somali clan, but being outnumbered in a specific area (like being Majerteen Mogadishu today), you would need some sort of protection or arrangement to do business or engage a profile activity. On the other hand being a Hawiye implies that you are safe, since Mogadishu has become a Hawiye-dominated city […].
>
> […]
>
> A joint Danish-Norwegian fact-finding mission (DIS/Landinfo FFM) in April and May 2013 were informed by an international NGO that within Mogadishu that, 'Persons returning from abroad are not particular risk because of their clan affiliation. When asked if this also included members of small minority clans as well as members of ethnic minority groups, an international NGO stated that this is the case… When asked if individuals who are having trouble with other persons or if they fear for something would be able to seek assistance, the international NGO stated that people can go to the police, contact their elders and/or contact an MP who is representing their own clan.' UNHCR Somalia, Mogadishu, confirmed to the FFM that, 'to benefit from clan protection, the person concerned must be known to the clan elders or to other clan members known to these elders. Information about a newcomer, particularly, when he/she does not belong to the existing clans or nuclear families or when he/she originates from an area formerly or presently controlled by an insurgent group, would certainly attract adverse attention. Even those who originate from Mogadishu may be perceived as

> newcomers, if they left a long time ago and have lost all links with their clan-based community'[…].
>
> Ultimately, whether or not Mr. Ahmed is able to establish sufficient links to satisfy Sheikhal or Hawiye elders of his clan identity, while potentially helpful**,** this issue does not appear to be determinative of whether Mr. Ahmed will be safe in Mogadishu.
>
> [Emphasis added.]

[25] Counsel for the Minister emphasized that the Minister's Delegate found that the Applicant's sub-clan membership "does not appear to be determinative of whether Mr. Ahmed will be safe in Mogadishu". However, as counsel for the Applicant notes, the Minister's Delegate did not say she would not rely on this report.

[26] On these facts I find that the Minister's Delegate both considered and relied on this internet report. I am also of the view that the material found through the UNHCR's website was a material consideration in the Delegate's Risk Analysis.

[27] In 1999, the Federal Court of Appeal held that documents such as this are "'extrinsic evidence' and must be disclosed by the Officer only if they are novel and significant and demonstrate changes in general country conditions that may affect the decision": *Nadarajah v Canada (Minister of Citizenship and Immigration)*, (1999), 237 NR 15 (FCA). In this connection, the general rule is that such officers must disclose extrinsic evidence relied upon and give the applicant an opportunity to respond if two conditions are met: first, where the evidence is truly extrinsic, i.e. "novel and significant", and second, where it is information the applicant could not reasonably have been expected to have knowledge of: *Joseph v Canada (Minister of Citizenship and Immigration)*, 2015 FC 904; *Toma v Canada (Minister of Citizenship and*

Immigration), 2006 FC 780 at para 14, citing Rothstein J in *Dasent v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 720 (TD) at pages 730 and 731 where Justice Rothstein concluded extrinsic evidence is that of which an applicant "could not reasonably be expected to have knowledge."

[28] In this case, the clan/sub-clan membership information found at the www.refworld.org website and relied upon by the Minister's Delegate, was dated 2017. The deadline for the Applicant to file his response to the Analyst's Report was October 31, 2016. Clearly, the Applicant could not be expected to have knowledge of this information.

[29] The failure to disclose and provide an opportunity to respond breached the procedural requirements established by paragraph 122 of *Suresh* in that this information, in my respectful view, constituted "material on which the Minister is basing her decision". Therefore it "must be provided to the individual." It was not. Therefore, the Minister's Delegate breached the duty of procedural fairness.

[30] During the hearing the Court heard comments on www.refworld.org. This is a UNHCR website, as noted previously. Material found on www.refworld.org has been relied upon by the Federal Court since at least 2008, i.e., for the last decade or more: *Cekaj v Canada (Citizenship and Immigration)*, 2012 FC 1531 per Rennie J (as he was then) at para 26; *Appu v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 780 per Shore J at para 43; *Muhammad v Canada (Citizenship and Immigration)*, 2012 FC 1483 per Boivin J (as he was then) at para 45; *Lai v Canada (Citizenship and Immigration)*, 2015 FC 646 per Strickland J at para 51; *Osorio Garcia v Canada (Citizenship and Immigration)*, 2012 FC 366 per Barnes J at paras 11-12;

Mfoutou Nsika v Canada (Citizenship and Immigration), 2012 FC 1026 per Gleason J (as she was then) at para 26; and *Es-Sayyid v Canada (Public Safety and Emergency Preparendess)*, 2011 FC 1489 per Shore J at para 49.

[31] Given the above, I have no doubt that www.refworld.org is properly used as a research tool by Canadian decision-makers in the context of refugee claims. As noted, that was not possible here.

[32] Therefore, judicial review is granted.

[33] Given that the Danger Analysis conducted by the Minister's Delegate under section 115(2)(a) was not challenged, I see no reasons why it should be relitigated. The findings of the Minister's Delegate in that regard bind the Applicant on the redetermination. The question for the new decision-maker is whether the Applicant, if removed to Somalia, will personally face a risk of persecution, risk to life, or risk of torture or cruel and unusual treatment or punishment.

VI. Certified question

[34] No question of general importance arises for certification.

JUDGMENT in IMM-3408-17

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted in part.
2. The decision of the Minister's Delegate on the Danger Analysis under paragraph 115(2)(a) is maintained.
3. The decision of the Minister's Delegate on the Risk Analysis, i.e., whether the Applicant if removed to Somalia, will personally face a risk of persecution, risk to life, or risk of torture or cruel and unusual treatment or punishment, is set aside and remanded for redetermination by a different decision-maker.
4. No question is certified.
5. No cost order is made.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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