

Federal Court



Cour fédérale

Date: 20191118

Docket: IMM-2136-18

Citation: 2019 FC 1444

Ottawa, Ontario, November 18, 2019

PRESENT: Mr. Justice Pentney

BETWEEN:

FAYSAL ALI NUR

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

[1] Faysal Ali Nur seeks judicial review of the decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board, dismissing his appeal and confirming the decision of the Refugee Protection Division (RPD) that found him not to be a refugee. The RAD's decision rests largely on credibility. The Applicant submits that the RAD made a number of reversible errors in its assessment of this question.

[2] For the reasons that follow, I find the decision of the RAD to be unreasonable.

I. Context

[3] The Applicant is a citizen of Somalia and a member of the Sheikhal clan. He says that his family began to be threatened by Al-Shabaab when they opened a restaurant in 2015. Eventually Al-Shabaab burned down the restaurant and the family fled Somalia. They travelled to Ethiopia in November 2016 and stayed there until March 2017.

[4] Arrangements were made for the Applicant to be smuggled to Canada, and he arrived on March 25, 2017. The Applicant submitted a claim for refugee protection, alleging that he would face risks from Al Shabab and the majority Hawadle clan if he is returned to Somalia.

[5] The RPD heard his claim on June 26, 2017, and rejected it on the same day, delivering brief oral reasons. The RPD noted that the Applicant did not have any primary identity documents to establish his identity, and found that he had not taken sufficient steps to obtain other evidence to meet his burden of proving his identity. The evidence the Applicant submitted from an individual he had known in Somalia, and in relation to his knowledge of the country, did not establish his identity. The RPD found that it could accept that the Applicant was “ethnically Somalian, but it [did] not preclude [him] from having obtained another nationality” (RPD decision at p 4). Therefore, the RPD rejected the Applicant’s claim because he had failed to provide sufficient credible evidence to establish his identity, as required by section 106 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and Rule 11 of the *Refugee Protection Division Rules*, SOR/2012-256.

[6] The Applicant launched an appeal to the RAD. He submitted new evidence, in the form of an affidavit from his father and a lease agreement signed by his father to corroborate his testimony that his family had recently moved from Ethiopia and settled in Kenya. In addition, the Applicant submitted a newspaper article about violence by Al-Shabaab militants. Since the RAD decision forms the crux of the application for judicial review, it will be discussed in more detail below. Briefly, the RAD found that the lease document was not credible and therefore rejected it; it also rejected the affidavit from the father since the lease was linked to the affidavit. It also found that the newspaper article was not relevant to the issues before it.

[7] The RAD found that certain of the credibility findings of the RPD were not correct, but based on its own assessment of the evidence, the RAD found that the Applicant had not established his identity. It found that the Applicant's answers to questions about his identity lacked credibility, pointing to a lack of clarity regarding his efforts to communicate with his family, as well as discrepancies relating to his alleged detention by the police in Ethiopia.

[8] The RAD found that the RPD had erred in placing an unreasonable burden on the Applicant to obtain identity documents from Somalia, given the difficulty of obtaining them in light of the situation in that country. However, the RAD concluded that the RPD did not err in finding that the Applicant had not established that he had made sufficient efforts to obtain other corroborating evidence, or in its assessment of the evidence he did provide.

[9] For these reasons, the RAD dismissed the Applicant's appeal and confirmed the decision of the RPD that he is neither a Convention refugee nor a person in need of protection pursuant to paragraph 111(1)(a) of *IRPA*. The Applicant seeks judicial review of this decision.

II. Issues and Standard of Review

[10] There are two issues in this case:

- A. Is the RAD's decision on the Applicant's identity reasonable?
- B. Did the RAD deny the Applicant procedural fairness by not holding a hearing?

[11] The first issue includes the issues raised by the Applicant regarding the RAD's assessment of his credibility, its consideration of the evidence of the witness who knew him in Somalia, the questions about the lease agreement and about the affidavit from the Applicant's father, as well as the question whether the RAD imposed an unreasonable burden of proof on the Applicant to establish that he held no other nationality.

[12] The standard of review for the first issue is reasonableness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paras 44 and 59 [*Khosa*]; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 [*Huruglica*]; and see the discussion in *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at paras 11-26 [*Rozas del Solar*]). Therefore, this Court will only interfere with the RAD's decision if that decision falls outside of 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 [*Dunsmuir*]). As long as the outcome fits comfortably with the principles of justification, transparency and intelligibility, it is not open to the Court to reweigh the evidence and substitute its own view of a preferable outcome (*Khosa* at paras 59 and 61).

[13] On the procedural fairness question the Court does not, strictly speaking, apply any standard of review analysis, as explained by Justice Donald Rennie in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 [CPR]. Instead, the Court must be satisfied that the duty to provide procedural fairness has been met. As summarized by Justice Denis Gascon in *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 52:

It is up to the reviewing court to make that determination and, in conducting this exercise, the court is called upon to ask, “with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed” (CPR at para 54). In other words, it requires the reviewing court to determine whether the administrative process followed by the decision-maker achieved the level of fairness required by the circumstances of the matter (*Aleaf v Canada (Citizenship and Immigration)*, 2015 FC 445 at para 21).

III. Analysis

A. *Is the RAD’s decision on the Applicant’s identity reasonable?*

[14] The Applicant argues that the RAD repeated the errors of the RPD in assessing his credibility, noting that neither body made any explicit finding about his testimony or his credibility. The reasons for a negative credibility finding must be clear and cogent, and absent that the decision is unreasonable (*Armson v Canada (Employment and Immigration)* (1989), 9 Imm LR (2d) 150, [1989] FCJ No 800 (QL) (FCA) at para 20). The failure to make clear credibility findings made it impossible for the RAD to assess the influence of the specific errors committed by the RPD. When these mistakes were repeated by the RAD it made it impossible for this Court to assess how the errors affected the RAD’s analysis. This renders the decision unreasonable.

[15] I disagree. Although it is correct that credibility findings must be made based on clear and cogent reasons, I do not find that the RAD failed in that regard. It points to two specific examples to justify its negative credibility finding, including its findings regarding the contradictions in the evidence about the Applicant's contact with his family, and the inconsistencies in his statement about being detained by the police. These are not hidden or implicit credibility findings, and it is not an error for the RAD to fail to list in a comprehensive fashion each and every basis for its negative credibility assessment. I do not accept this aspect of the Applicant's argument.

[16] The Applicant further submits that the RAD's assessment of various elements of the evidence is unreasonable. Before discussing the specific concerns, it is important to recall two key propositions, which frame the rest of my analysis. First, the RAD is required to undertake its own review of the evidence, as noted by Justice Alan Diner in *Rozas del Solar* at paragraph 122:

In *Huruglica*, the Federal Court of Appeal did not specifically use the language of independent assessment. Nevertheless, subsequent cases have held that *Huruglica* endorsed a thorough, comprehensive, and independent review by the RAD (see, for instance, *Gabila v Canada (Citizenship and Immigration)*, 2016 FC 574 at para 20; *Marin v Canada (Citizenship and Immigration)*, 2016 FC 847 at paras 32–33).

[17] Second, a reviewing court is required to show deference to the factual findings of the decision-maker, in particular its credibility determinations, for the reasons explained by Justice Mary Gleason in *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 [*Rahal*] at para 42. However, within the limited role for a reviewing court in such matters, a number of principles establish the contours of what is required for a reasonable assessment of credibility, including that the contradictions that underpin a negative finding must be real and not trivial or

minute, and that a “generalized, imprecise and vague credibility conclusion without particulars is subject to being set aside on review (see e.g. *Hilo v Canada (Minister of Employment and Immigration)* (1991), 15 Imm LR (2d) 199, [1991] FCJ No 228 (FCA)” (*Rahal* at paras 43-46).

[18] With this framework in mind, I will now turn to a consideration of the Applicant’s arguments on the RAD’s various credibility findings regarding his identity. The Applicant contends that the RAD committed four errors: (i) in finding inconsistencies regarding the narrative about contact with his family and the incident with the police; (ii) in dismissing the testimony of his friend from Somalia on the basis of unclear and badly translated evidence; (iii) in rejecting his father’s affidavit because of the problems identified with the lease document; and (iv) by imposing an unreasonable burden on him to obtain identity documents, and finding that he made insufficient efforts to obtain corroborating evidence from his extended family.

(1) Inconsistencies in the narrative

[19] The RAD found that the Applicant’s testimony was inconsistent on several key points relating to his identity. It concluded that he did not provide direct answers to questions asked of him about his communication with his family and contrasted his answers about how difficult it was to contact his family with his knowledge that they had moved from Ethiopia to Kenya. Further, the RAD stated that the Applicant provided inconsistent evidence regarding his interactions with the Ethiopian police, noting that while he “testified he was detained by the police for a week and his father had to pay a bribe to get him released” this was not mentioned in his Basis of Claim form (RAD decision at para 22). The RAD rejected his explanation that he had not been formally arrested or charged, and it was not an “official” detention. On the basis of

these problems, it concluded that the Applicant was “lacking in credibility in areas that specifically relate to his identity” (RAD decision at para 23).

[20] The difficulty with these findings is that they are not supported by the evidence. First, the RAD is conflating the Applicant’s testimony regarding the problems he had contacting his family while they were living without legal status in Ethiopia, with his evidence about his contact with them after they moved to Kenya. Second, there is no basis in the record for the RAD’s conclusion that the Applicant had testified that he was in police detention for a week. Rather, his testimony was to the effect that he was never officially imprisoned, but rather the police took him into custody and as soon as that happened, his father came to pay a bribe for his release.

[21] The issue of identity lies at the heart of a refugee claim, and more generally it is “the cornerstone of the Canadian immigration regime” (*Canada (Public Safety and Emergency Preparedness) v Gebrewold*, 2018 FC 374 at para 21). It is not reasonable for the RAD to make negative credibility findings on such a vital question based on a misinterpretation of the key evidence on the matter. While these errors may not have been sufficient to overturn the decision, when combined with the other mistakes discussed below they render the RAD’s decision unreasonable.

(2) The evidence of the friend from Somalia

[22] In an effort to establish his identity, the Applicant had located someone in Canada that he had previously known in Somalia. The Applicant said he had met this witness in 2010 in

Mogadishu. They had spent two months doing various things together, while the Applicant was on his school break. They had no further contact with one another, and only met again in Canada.

[23] The RAD found that the RPD had erred in concluding that the happenstance meeting of the Applicant and the witness in Canada was lacking in plausibility. However, the RAD determined that the Applicant and the witness were lacking in credibility because it found important discrepancies in their evidence:

Nonetheless, I have reviewed the witness testimony and evidence and find that the witness and [Applicant] were lacking in credibility in one crucial area. According to the witness statement, the witness worked “as a mechanic in Mogadishu for the claimant’s uncle.” At no time during the witness testimony did he indicate he worked for the [Applicant’s] uncle. The [Applicant], when asked by the RPD how he knew the witness, testified: “When I visited my uncle in 2010 he took me to the witness’ garage.” When the [Applicant] was asked directly who owned the garage he testified that it was “owned by other people.” While this testimony appears to have changed when the interpreter indicated that he was not sure what exactly was said, whether it was owned by “the witness [Applicant] or other people” at no time did anyone indicate that the [Applicant’s] uncle owned the garage, as indicated in the witness statement. I find therefore that this negatively impugns the credibility of the witness-[Applicant] relationship.

(RAD decision at para 32; footnotes omitted.)

[24] The Applicant argues that the RAD misunderstood the explanation offered as to the ownership of the garage, and thereby failed to properly assess this evidence. In addition, the Applicant contends that the RAD erred in failing to convene an oral hearing to dispel the confusion caused by the translation challenges, and that it is unreasonable to base a negative credibility finding on a microscopic view of the facts.

[25] I agree. There are several errors in the RAD's consideration of this evidence, including the failure to explain why it found this detail to be "crucial" in regard to the Applicant's identity, its failure to discuss the explanation offered by the Applicant as to the misunderstanding about who owned the garage, and its failure to hold an oral hearing to provide the Applicant with an opportunity to answer any questions regarding a problem that only emerged from the translation of his testimony before the RPD, and which at the least must have given rise to doubts about what the true story actually was.

[26] The RAD ultimately concluded that the witness had only known the Applicant for a short time, and could not establish his identity or nationality as a Somali citizen. The difficulty with this conclusion is that it is impossible to ascertain whether or how the earlier negative credibility finding affected this assessment.

[27] It is worth recalling the principles stated in *Rahal*, including that if a negative credibility finding is based on a contradiction in the testimony, the discrepancy must be "real as opposed to illusory," and that the decision-maker "cannot seize on truly trivial or minute contradictions to reject a claim" (at para 43). I find that this is precisely what the RAD did in regard to this evidence, and that its assessment cannot stand.

(3) The rejection of the affidavit from the father

[28] The Applicant filed further evidence before the RAD hearing in order to try to address the shortcomings identified by the RPD in regard to his efforts to obtain evidence from his family to corroborate his identity. This included an affidavit from his father, as well as a lease document that his father had signed in Kenya. The Applicant sought to bolster his evidence that

he had not been able to contact his family while they lived a precarious existence in Ethiopia, but he had been able to do so now that they had settled in Kenya.

[29] The RAD found that the lease document was lacking in important details, such as the specific address of the premises, the P.O. box number of the address of the landlord, and a spelling mistake in the document. Based on these problems, the RAD concluded that the lease was lacking in credibility.

[30] The RAD then concluded that the affidavit from the Applicant's father was cast into doubt because the lease agreement accompanied the affidavit. The RAD cited authority for the proposition that "submitting a false or irregular document may have an impact on the weight assigned to other documents provided by [the party], especially when they are interrelated and on the overall credibility of the [Applicant]." It therefore rejected the affidavit as not being "new" as required by subsection 110(4) of *IRPA* as well as lacking in credibility (RAD decision at para 13).

[31] The Applicant argued that the RAD's rejection of his father's affidavit, a crucial piece of evidence in support of the core question of his identity, was unreasonable. By extending its reliability concerns about the lease agreement to the affidavit, and by not engaging in an independent examination of the credibility of the affidavit itself, the RAD committed a reviewable error.

[32] I agree. It is now trite law that the RAD must examine each piece of evidence separately, and while authenticity concerns about documents submitted by an applicant can be grounds to

closely scrutinize other evidence submitted in support of the claim, it is not reasonable or justifiable to lump the evidence together and to treat it as an undifferentiated mass (*Hohol v Canada (Citizenship and Immigration)*, 2017 FC 870 at para 29). Rather, the RAD must examine the evidence individually, and then it may draw overall conclusions regarding the credibility or sufficiency of the evidence taken as a whole. In this case, the RAD was required to consider whether any other aspect of the father's evidence about the Applicant's identity was credible. That was not done here and, in my view, this was unreasonable.

(4) The burden of proof imposed on the Applicant to corroborate his identity

[33] The RAD agreed with the Applicant that the RPD had imposed an unreasonable burden on him to obtain identity documents, in view of the evidence about the difficulty of obtaining any reliable documents from Somalia. However, the RAD went on to find that the evidence showed that the Applicant had extended family in Somalia and Kenya, but it found that he did not make sufficient efforts to obtain corroboration placing him in the countries he said he had lived in, or to confirm his identity as a citizen of Somalia.

[34] The RAD points to the Applicant's testimony that it is possible to obtain school documents, but that he had not done so. Further, it discounts the letter he obtained from Dixon Community Services, which stated that the Applicant demonstrated that he spoke the Somali language, was familiar with its geography, and was able to answer specific questions about his clan. The RPD had found this evidence to be of limited probative value, and the RAD agreed.

[35] The Applicant argues that the RAD has erred by imposing an unreasonable burden on him to obtain evidence to corroborate his identity. Here, the RAD itself found the RPD to have

erred in imposing such a burden, but it then went on to find that the Applicant had fallen short of meeting a similar burden. The Applicant further contends that the RAD ignored or unreasonably discounted the evidence he did submit on this question, including his explanation for his difficulty in contacting his family, the witness whom he knew in Somalia, and the letter from Dixon Community Services.

[36] I find that the RAD's treatment of some of this evidence to be unreasonable. For example, the Applicant did testify that it was possible for him to try to obtain school documents from Somalia, which leads the RAD to conclude that the Applicant should have attempted to do so, and his failure to take this step diminishes his credibility. Similarly, the RAD finds that the Applicant did not demonstrate that he took sufficient steps to try to obtain corroborating evidence from his extended family, and this in turn reduces his credibility.

[37] The difficulty with both conclusions is that the RAD appears to ignore the Applicant's testimony as to the many problems he either did or would encounter in trying to obtain such evidence from Somalia, problems substantiated in the country information. The RAD does not take this into account in assessing the evidence. This case is similar to *Abbar v Canada (Citizenship and Immigration)*, 2017 FC 1101, in which Justice Michel Shore found, at paragraph 40, that it is contradictory to conclude the applicant cannot be a Somali citizen, given the lack of evidence, even though a family member attested to their identity, the applicant produced a letter from Dixon Community Services attesting to his knowledge of the country, and the documentary evidence demonstrated the difficulty of obtaining identity documents.

[38] In addition, the RAD does not discuss the specific evidence from Dixon Community Services, which is directly relevant to its assessment of his identity. The letter stated that the Applicant “scored very high on the geography tests about Somalia, the Somali culture or history and places in Somalia in general and Hiraan region in particular.” The Applicant testified that his interview with the organization included questions about specific neighbourhoods in Somalia, the national anthem, and the former presidents of the country.

[39] The RAD imposed a burden on the Applicant to establish his identity that was somewhat more stringent than “balance of probabilities” but perhaps fell short of “beyond a reasonable doubt.” In doing so I find the RAD’s analysis on this point to be unreasonable (*Singh v Canada (Citizenship and Immigration)*, 2016 FC 169 at paras 4-6).

(5) Summary

[40] Judicial review on a standard of reasonableness requires the Court to determine whether the decision falls within “the range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at para 47). The decision must demonstrate “justification, transparency and intelligibility” (*Khosa* at para 59). As explained by Justice Russell Zinn in *Jakutavicius v Canada (Attorney General)*, 2011 FC 311 at para 31: “[j]ustification requires a decision maker to focus on relevant factors and evidence. Transparency requires a decision maker to clearly state the basis for the decision reached. Intelligibility requires a decision maker to reach a result that clearly follows from the reasons provided.”

[41] To put it another way, on judicial review on the deferential standard of reasonableness, a key concern is whether the process and decision indicate that the decision-maker truly “engaged”

with the evidence, applying the appropriate legal test. The standard is not perfection. It must be recalled that Parliament assigned the task of conducting the initial inquiry into the facts to the administrative decision-maker (here, the RPD, and then the RAD). Deference is due to a decision-maker in particular in a context where the inquiry is primarily factual, and it is within the decision-maker's area of expertise, in a situation where greater exposure to the nuances of evidence or a greater awareness of the policy context may provide an advantage. If the chain of reasoning of the decision-maker can be understood, and if it shows that this type of engagement occurred, the decision will generally be found to be reasonable: see *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431.

[42] In this case, the focus is mainly on the RAD's assessment of the evidence, rather than its interpretation of the legal principles. I have found that the RAD's decision is unreasonable, because it does not demonstrate that it "engaged" with the evidence that was before it on several key aspects of the case. This is sufficient to overturn the decision.

[43] In light of my findings on this issue, it is not necessary to consider the procedural fairness question.

IV. Conclusion

[44] For the reasons above, I find the RAD decision to be unreasonable. Its analysis falls short of what is required under the reasonableness standard of review, because I find the decision is not justifiable, transparent, or intelligible, in light of the evidence on the record.

[45] The RAD decision dated April 10, 2018, is set aside and the matter is remitted back to the RAD for reconsideration by a different panel.

[46] No question of general importance was proposed by the parties, and none arises in this case.

JUDGMENT in IMM-2136-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The Refugee Appeal Division decision dated April 10, 2018, is set aside and the matter is remitted back to the Refugee Appeal Division for reconsideration by a different panel.
3. No question of general importance is certified.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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