Federal Court  Cour fédérale

Date: 20240223

Docket: IMM-961-23

Citation: 2024 FC 299

Ottawa, Ontario, February 23, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

BILE SHEIKH OMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant applies for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the January 6, 2023 decision of a Senior Immigration Officer [Officer] refusing the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the IRPA.

[2] For the reasons set out below, the Application is refused. Having considered the Officer's reasons holistically, I am not persuaded the Applicant has demonstrated the decision is either unreasonable or that there was a breach of procedural fairness.

II. Background

[3] The Applicant, Omar Bile Sheikh, reports that he is a citizen of Somalia who claimed refugee protection upon his arrival in Canada in 2015.

[4] The Applicant reports he is a member of a minority clan in Somalia and he faces risk from the majority clans in that country. He also reports that he fears the terrorist group Al Shabaab who reportedly killed his father, his second spouse and a friend, and severely injured his brother. The Applicant left Somalia for the United States of America [USA]. After his asylum claim was refused in the USA, he travelled to Canada in 2015 and initiated a refugee claim.

[5] In September 2015, the Refugee Protection Division [RPD] refused the Applicant's claim, finding he lacked credibility and that the evidence submitted was insufficient to establish identity. The Refugee Appeal Division [RAD] dismissed his appeal in March 2016. A subsequent Application for Leave and for Judicial Review of the RAD's decision was denied.

[6] An Administrative Deferral of Removal [ADR] implemented pursuant to subsection 230(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, currently suspends removals to several regions of Somalia including Mogadishu. The Applicant reports he

is from Mogadishu. As a result, the Applicant's removal order is, and will remain, unenforceable until the ADR is lifted.

[7] The Applicant applied for permanent residence from within Canada on H&C grounds in March 2019. The H&C application was refused. That refusal was subsequently set aside on judicial review (*Omar v Canada (Citizenship and Immigration)*, 2021 FC 1201). On redetermination, a Senior Immigration Officer [Officer] again refused the application. It is that decision being reviewed here.

III. Decision under Review

[8] The Applicant provided updated submissions to the Officer in support of the H&C application. The Applicant identified establishment in Canada, the best interests of his minor son and two orphaned minors in Somalia, the support he provides to his disabled brother in Somalia, adverse country conditions in Somalia and his mental health issues as factors to be considered. The Officer addressed each of the identified factors. In addition, the Officer addressed the issue of identity.

[9] In considering establishment, the Officer assigned positive weight to the Applicant's employment status (full-time and paying taxes), his volunteer activities and efforts to upgrade his skills. The Officer also acknowledged letters of support indicating the Applicant is of good character. However, to the extent those letters described adverse conditions in Somalia and the Applicant's personal experience in that country, the Officer did not give them full weight, finding that the information had been derived from hearsay. The Officer also noted the absence

of documentation to demonstrate savings or a pattern of sound financial management and was not satisfied the Applicant possessed the funds to support his long-term stay in Canada. The Officer found the Applicant had somewhat established himself in Canada, but noted that establishment alone was not determinative of the application.

[10] In considering the best interests of the children [BIOC], the Officer acknowledged that the Applicant reported supporting a minor son and two orphans in Somalia. He also claimed to support an adult son in Turkey and his disabled brother in Somalia who is the primary caregiver for the minor children. The Officer noted the lack of evidence to (1) establish a parental link between the Applicant and the minor son, and (2) demonstrate that financial support was being provided to various family members. The Officer acknowledged the Applicant's explanation that unofficial channels were used to send financial support to Somalia and accepted that some financial support was provided. However, the Officer was not convinced that the financial support would cease or that the best interests of the children in continuing to receive the support would be impacted if the H&C application were refused. The Officer came to this conclusion because the existing temporary stay on removals to Somalia allows the Applicant to remain and work in Canada.

[11] With respect to identity, the Officer found the Applicant had not established, on a balance of probabilities, that he was a national of Somalia. The Officer accepted that it is difficult to verify nationality as a Somali but found the Applicant was nonetheless required to take reasonable steps to prove his identity. The Officer reviewed a series of affidavits, letters and a purported court document. In considering each of these documents, the Officer detailed

identified discrepancies, and noted that the respective affiants did not detail the basis for knowledge of certain facts. The Officer also noted that the affiants (reported family members or acquaintances) were not disinterested parties in regard to the outcome of the H&C application. The Officer found the concerns identified either undermined the reliability or the probative value of the documentary evidence. The Officer stated the RPD and the RAD's prior credibility findings were not binding but noting the expert nature of these bodies, the Officer gave the prior credibility findings significant weight and concluded the documentary evidence, as assessed, to be insufficient to overcome the credibility concerns. The Officer concluded the Applicant had failed to establish his identify as a Somali national on a balance of probabilities.

[12] The Officer noted that risk factors in Somalia were to be considered in the context of the H&C application for assessing adversity or hardship should the Applicant be required to apply for PR status from outside Canada. The Officer noted the Applicant's alleged risk of harm from the majority clans in Somalia, as well as the Al Shabaab, but also noted the negative outcome of the RPD proceedings. The Officer accepted the situation in Somalia is precarious, that healthcare and social services may be difficult to access and acknowledged COVID-19 challenges. The Officer concluded that the conditions in Somalia, including the hardship at the hands of the majority clans and the Al Shabaab, would have little applicability to the Applicant as he had failed to establish his identity, a circumstance that fundamentally hindered a personalized assessment of hardship. Again, the Officer noted that refusal of the H&C application did not place the Applicant at risk of removal due to the ADR to certain parts of Somalia. The Officer did not give significant weight to the country condition factors or the hardship associated with them.

[13] Finally, the Officer addressed the psychological assessment provided and gave some weight to the fact that the Applicant struggles with mental health issues, and has symptoms of PTSD, generalized anxiety and major depression. The Officer did not accept that the Applicant's pending removal to Somalia contributed to a deterioration in his mental health, again relying on the Applicant's failure to establish his identity and the absence of any immediate risk of removal due to the ADR. The Officer found that the Applicant could continue counselling and treatment in Canada to aid with his mental health.

[14] Having considered all of the circumstances, the Officer concluded the H&C considerations did not justify an exemption under subsection 25(1) of the IRPA.

IV. Issues and Standard of Review

[15] The Applicant has identified six separate issues arising from the Officer's decision. Having reviewed the submissions, I have framed the issues under two headings:

1. Was the Officer's refusal of the H&C request unreasonable?
2. Did the Officer breach procedural fairness in not providing the Applicant an opportunity to respond to the Officer's various concerns with the identity evidence?

[16] The Officer's decision is to be reviewed against the presumptive standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]). On reasonableness review, the reviewing court must consider the reasoning process and whether the decision as a whole demonstrates the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). The party

challenging a decision has the burden of showing it is unreasonable by satisfying the reviewing court that the decision suffers from sufficiently central or significant flaws. Superficial or peripheral flaws will not justify intervention on judicial review (*Vavilov* at para 100).

[17] Issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the Court is to determine whether the proceedings were fair in all of the circumstances – "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond." This most closely resembles the correctness standard of review (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56).

V. Analysis

A. *The Officer's decision was not unreasonable*

(1) The Officer committed no reviewable error in noting that the affiants were not disinterested in the outcome

[18] The Applicant relies on *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24 [*Tabatadze*] in submitting that the Officer improperly and unreasonably discounted evidence on the basis that the affiants, family members and friends, were not disinterested in the outcome of the H&C application. The Applicant submits the Officer's treatment of the evidence is particularly problematic in this instance because Somalis often require this very type of evidence to establish their identity (*Abdullahi v Canada (Citizenship and Immigration)*, 2015 FC 1164 at para 9).

[19] The Respondent relies on *Fadiga v Canada (Citizenship and Immigration)*, 2016 FC 1157 at paras 13-15 to argue that it was open to the Officer to consider the affiants' interests in the outcome, particularly where negative credibility findings had been made by another tribunal and the evidence was not otherwise corroborated.

[20] In *Tabatadze*, Justice Henry Brown states:

> [4] While counsel canvassed a number of issues, in my view, the determinative issue is the RPD's blanket rejection of all affidavit evidence filed by the Applicant's family and relatives. The RPD gave this evidence "no weight", saying: "[d]ocuments signed by his family members are self-serving since they are from his family members who have interests in the outcome of the claimant's refugee claim in Canada and as a result, the panel gives no weight to these documents." This Court has repeatedly criticized the outright rejection of evidence provided by relatives and family members of an applicant or claimant because such evidence is self-serving: see *Kaburia v Canada (Citizenship and Immigration)*, 2002 FCT 516 at para 25; *Ahmed v Canada (Citizenship and Immigration)*, 2004 FC 226 at para 31; *Mata Diaz v Canada (Citizenship and Immigration)*, 2010 FC 319 at para 37; *Magyar v Canada (Citizenship and Immigration)*, 2015 FC 750 at para 44; and *Cruz Ugalde v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 458 at para 26, as examples. I repeat those criticisms here.
>
> [5] This Court stated one of the underlying reasons why this approach is unreasonable in *Varon v Canada (Citizenship and Immigration)*, 2015 FC 356 at para 56:
>
> > […] If evidence can be given "little evidentiary weight" [or no weight at all in the case at bar] because a witness has a vested interest in the outcome of a hearing then no refugee claim could ever succeed because all claimants who give evidence on their own behalf have a vested interest in the outcome of the hearing. […]
>
> [6] In addition, rejection of evidence from family and friends because it is self-serving or because the witnesses are interested in the outcome, is an unprincipled approach to potentially probative and relevant evidence. To allow a tribunal to reject otherwise

> relevant and probative evidence in this manner creates a tool that may be used at any time in any case against any claimant. It therefore defeats a primary task of such decision-makers which is to assess and weigh the evidence before them.

[21] The rejection of evidence solely on the basis that it originates with family or friends is unprincipled and fails to recognize that often this type of evidence is all that is available to an Applicant in the immigration context.

[22] However, in this instance, the Officer's self-interest statements were but one observation the Officer made in conducting a detailed assessment of each of the documents. The Officer identified and addressed discrepancies and weaknesses in each piece of evidence, and subsequently assessed the reliability, probative value and weight to be accorded to each piece of evidence. The Officer's consideration of the evidence was also undertaken in the context of prior negative credibility findings, findings that the Officer expressly addressed and accorded significant weight. No reviewable error has been demonstrated.

(2) The Officer committed no reviewable error in observing on the insufficiency of evidence of sound financial management

[23] The Applicant also argues that, in considering establishment, the Officer unreasonably required that the Applicant demonstrate evidence of sound financial management. The Applicant submits the Officer unreasonably required the Applicant demonstrate an arbitrary and subjective level of savings to be eligible for H&C relief. Again, I disagree.

[24] The Officer's financial management observations are not linked to income level, but instead arise from the evidence relating to the Applicant's full-time employment, reported income and assertions that monies were regularly provided to support other family members. The Officer's comments do not support the conclusion that the Officer adopted a subjective and arbitrary savings threshold. Nor do the Officer's comments suggest H&C relief is limited to the wealthy. As the Respondent has noted, sound financial management can be assessed regardless of income level and is a matter that was open to the Officer to comment on in considering establishment.

(3) BIOC

[25] In conducting a BIOC analysis, decision-makers must identify a child's interests and examine those interests attentively and in light of all of the evidence (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 39 [*Kanthasamy*]).

[26] The Applicant submits the Officer failed to address the basic needs of the minor children in Somalia and failed to provide reasons to support the conclusions reached. I am unable to agree.

[27] The Officer's decision must be considered in light of the Applicant's submissions on the BIOC issue (*Vavilov* at paras 127–128; *Kanthasamy* at para 39; *Rozgonyi v Canada (Citizenship and Immigration)*, 2022 FC 349 at para 17). As the Officer noted, the Applicant's BIOC submissions were sparse. Those limited submissions focus on conditions in Somalia and how

they will affect the Applicant's ability to continue to provide the children with continuing financial support if he were to return to Somalia. The possibility of sponsorship is also raised.

[28] The Officer did grapple with the submissions and addressed the interests of the children within the context of the limited documentation and information provided. In the absence of evidence detailing what, if any, contact the Applicant has had with the children, it was not unreasonable for the Officer to conclude, as they did, that the children's best interests would be served by having them remain with their primary caregiver, the Applicant's brother.

[29] The Officer's BIOC analysis is not lengthy. However, when read in light of the submissions made, I am satisfied the analysis was responsive to those submissions and reflects the attributes of justification, transparency and intelligibility that are required of a reasonable decision.

(4) Treatment of identity evidence

[30] The Applicant argues that, in considering the documentary evidence, the Officer engaged in speculation and an overzealous search for inconsistencies. The Applicant also argues that the Officer's findings are not based in fact because the Officer did not engage in any formal comparative analysis of similar authentic documents, but rather engaged in highly subjective conjecture and drew improper inferences.

[31] I have carefully reviewed the Applicant's submissions and conclude they are without merit. With the possible exception of the Abdulaziz District Court documents, at pages 170 and

171 of the Applicant's Record, the documents in issue are not, and do not purport to be, official documents for which authentic comparisons might be available. The deficiencies and errors the Officer has identified in the documents are readily identifiable on the face of the documents. It was open to the Officer in examining the documentary evidence to note the errors and reach conclusions relating to the reliability and the weight to be given to the evidence. The Officer's consideration of the documentary evidence is comprehensive, but this was not inappropriate in the context of the previous negative credibility determinations that the Officer had considered and to which the Officer had given significant weight. Much of the Applicant's argument in this regard reflects disagreement with the Officer's weight and reliability determinations. This is not a basis for intervention on judicial review.

(5) Contradictory findings

[32] The Applicant submits that the Officer erred in requiring him to show "compelling" evidence of identity – only credible evidence is required. The Applicant further submits the Officer erred by requiring the Applicant to overcome the RPD or the RAD's credibility findings, submitting these were only to be considered by the Officer. Finally, the Applicant submits that the Officer's finding that there is an ADR that would benefit the Applicant cannot be reconciled with the Officer's findings that it has not been established where the Applicant comes from or to what country he would be removed. None of these arguments is persuasive.

[33] The Officer's use of "compelling" to describe the quality of the evidence required to establish identity was not an error. It is clear upon reading the decision holistically that the Officer identified and adopted the balance of probabilities standard as the legal burden the

Applicant was required to meet – "[b]ased on the totality of the information before me, I do not find the applicant has established, on a balance of probabilities, his identity as a Somali national in this H&C application." The Officer did not err.

[34] The Applicant cites no authority to support the assertion that the Officer erred in according significant weight to the RPD and the RAD's credibility findings. It was open to the Officer to refer to the credibility findings and give them considerable weight. In doing so, the Officer's obligation was to consider and address any evidence that was not before the RPD or RAD, as the Officer did (*Abdi v Canada (Citizenship and Immigration)*, 2022 FC 901 at para 16).

[35] Finally, there is no contradiction between the RAD's conclusion that the Applicant had failed to establish his identity and the Officer having recognized the factual reality that the Applicant will continue to be subject to the ADR on the basis of his alleged but unestablished identity.

B. *No breach of fairness*

[36] The Applicant notes that the initial H&C decision did not take issue with the Applicant's identity and that, in dealing with the issue on redetermination, the Officer erred by not providing the Applicant with notice and an opportunity to respond. The Applicant submits it was unfair to have required the Applicant to anticipate the identity concerns given the previous H&C decision.

[37] The Applicant's fairness argument is not persuasive. The Applicant was well aware that, in pursuing his refugee claim, he had not succeeded in establishing his identity and that identity therefore remained an issue. As the Officer's decision states, the Applicant bears the onus of satisfying the decision-maker that H&C relief is warranted. A prior H&C decision, a decision that the Applicant successfully argued was unreasonable, cannot be relied upon to impose a duty on an Officer conducting a *de novo* redetermination to give notice in respect of a matter that is clearly in issue.

VI. Conclusion

[38] The Application for Judicial Review is dismissed. Neither party has proposed a question for certification and none arises.

JUDGMENT IN IMM-961-23

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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