

Federal Court



Cour fédérale

**Date: 20100730**

**Docket: IMM-4721-09**

**Citation: 2010 FC 795**

**Ottawa, Ontario, July 30, 2010**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**ALI ABADIR**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY  
AND EMERGENCY PREPAREDNESS**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Mr. Abadir Ali applies for judicial review of the June 30, 2009 decision of the Enforcement Officer (the Officer) dated September 21, 2009 refusing the Applicant's request for a deferral of his removal from Canada.

[2] Mr. Abadir Ali was the subject of a Danger Opinion by the Minister's Delegate who concluded the Applicant would neither face a serious possibility of persecution, nor risk to his life or cruel or unusual treatment on being returned to Somalia.

[3] The Canada Border Services Agency notified him that his removal was scheduled for September 22, 2009. He requested a deferral of his removal on September 21, 2009. The Officer refused the request.

[4] Mr. Abadir Ali submits there is new evidence not before the Minister's Delegate of a dramatic change in country conditions that would expose him to risk of death or inhumane treatment if he is removed to Somalia.

### **Background**

[5] On June 30, 2009, the Minister's Delegate found the Applicant to be a danger to the Canadian public because of his adult criminal history, his failure to abide with release orders and the low potential of his rehabilitation. The Delegate assessed the danger to the public should he remain in Canada against the risk the Applicant would face if removed to Somalia. The Delegate acknowledged the situation in Somalia was volatile, but she concluded it was dangerous for all Somalis and the Applicant would not face any particularized risk.

[6] The Applicant was scheduled for removal to Somalia on September 22, 2009. He was to be escorted by CBSA officers from Montreal to Nairobi, Kenya and accompanied to the point of departure for Mogadishu, Somalia. He was to be provided with 150 Euros so he could make his way to Hargesia, Somaliland, in northeastern Somalia.

[7] The Applicant requested an indefinite deferral of his scheduled removal on September 20, 2009. The request for deferral was refused by the Officer on September 21. The Applicant sought a stay of his removal pending his application for leave and judicial review of the Danger Opinion and the Removal Order.

[8] At the stay hearing Justice Lemieux raised a question about the situation in Mogadishu given the recent decision in *Aden v. Canada (Citizenship and Immigration)*, 2009 FC 561. In *Aden* there was a serious issue as to whether that applicant had a viable internal flight alternative as the PRRA officer relied on dated materials and other documentary evidence without regard or analysis to the current actual state in Mogadishu. Justice Lemieux ordered a short interim stay.

[9] On resumption of Mr. Abadir Ali's stay hearing, CBSA officials submitted a revised Removal Order with new travel arrangements re-scheduling removal for September 24 and a different itinerary. The Applicant would be escorted by CBSA officials to Nairobi, Kenya, and then he would travel by direct flight to Bossao in the north of Somalia in the company of private security.

[10] Justice Lemieux issued his decision on October 1, 2009 staying the removal until a decision on leave and, leave being granted, the hearing of the application for judicial review of the deferral refusal.

[11] Leave was granted and both applications for judicial review of the Danger Opinion and the refusal of the deferral request were combined. I heard both applications on April 28, 2010. I had

allowed the parties additional time for further submissions with respect to the revised travel arrangements. My decision on the application for judicial review of the Danger Opinion in IMM-3998-09 is issued by way of a separate judgment issued concurrently with this decision on the refusal of the deferral request. I have dismissed the application for judicial review of the Danger Opinion.

### **Decision Under Review**

[12] The Officer began by noting the reasons the Applicant presented on September 20th for requesting indefinite deferral. Those reasons are:

- i. Since Danger Opinion issued, the country conditions changed. The Applicant is at risk in returning to Somalia due to new circumstances occurring within the last two months. The Applicant's removal should be deferred until a new determination of a risk assessment.
- ii. Since the Danger Opinion was issued, the conditions in Somalia have changed. These new circumstances allegedly put the Applicant at greater risk than was foreseen in the Danger Opinion.
- iii. The Applicant should be allowed an opportunity for rehabilitation.

[13] The submission to the Officer in support of the Applicant's deferral request consisted of affidavits of individuals or petitions either identifying risk to the Applicant on return to Somalia or offers to help the Applicant rehabilitate and documentary material reporting on instability in the Somaliland region. The Officer also had the June 30, 2009 Danger Opinion before him.

[14] The Officer noted that it was not within his authority to make a proper determination of risk an applicant may face on return. He noted the balancing of risk has already been addressed in the Danger Opinion.

[15] The Officer concluded the new information would not influence the balance of risk previously conducted. He was unable to grant a deferral without an alternative date because any such deferral would be for an indefinite period.

[16] The Officer concluded that he was not satisfied a deferral of the removal order was appropriate under the circumstances.

### **Legislation**

[17] The IRPA provides:

*Immigration and Refugee Protection Act, (2001, c. 27)*

48. (1) A removal order is enforceable if it has come into force and is not stayed.

(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.

48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

...

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

## **Issues**

[18] The Applicant raises the following issues:

1. Whether the Officer misapprehended the evidence before him or ignored it and fettered the scope of his discretion to defer in appropriate circumstances?
2. Did the Officer err in refusing to defer the Applicant's removal where failure to defer will expose the Applicant to the risk of death or inhumane treatment in circumstances in Somalia?

3. Whether the travel and removal arrangements put in place for the Applicant's removal compatible with the principles of fundamental justice guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*?
4. Do the new travel arrangements confirm that the original removal arrangements to Mogadishu presented a personal risk to the Applicant?

[19] The Respondent treats the issue as:

1. Was the Officer's decision reasonable?
2. Is the alteration of the modality of removal relevant to the judicial review of the decision?

[20] In my view, the issues arising in this judicial review of the refusal to defer are:

1. Did the Officer fetter his discretion in deciding to refuse the Applicant's request for deferral?
2. Was the Officer's decision reasonable?

### **Standard of Review**

[21] The Supreme Court of Canada found in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*) that questions of fact and mixed questions of fact and law should be afforded a degree of deference and reviewed on a standard of reasonableness.

[22] The Federal Court of Appeal in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 held that the applicable standard of review for cases concerning deferrals of removal is reasonableness.

[23] The Supreme Court developed the notion of reasonableness in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (*Khosa*). Significant deference is owed the Minister's Delegate for his findings of fact and weighing of evidence. The Court wrote at para. 59:

“Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.”

[24] The application of the *Charter* is a question of law reviewable on the standard of correctness. (*Dunsmuir*)



## Analysis

*Did the Officer fetter his discretion in deciding to refuse the Applicant's request for deferral?*

[25] The Applicant submits the Officer fettered his discretion by refusing to reconsider the risk Mr. Abadir Ali might face upon removal to Somalia. Their allegation is based on the following in the Officer's reasons:

Mr. Abadir Ali'S [sic] was found to be a Danger to the Public by the Minister of Citizenship and Immigration Canada in June 2009. It is important to note that this Danger Opinion supersedes any risk Mr. ABIDER faces upon his return to Somalia.

[26] I do not agree that the statement confirms the Officer was limiting the scope of his discretion in considering the Applicant's deferral request. The Officer clarifies his understanding when he goes on to state the balancing of the risk of return to Somalia and the danger to the public has already been addressed in the Danger Opinion.

*Was the Officer's decision reasonable?*

[27] The Applicant requested an indefinite deferral in part to have an opportunity to rehabilitate.

[28] The Officer's duty arises from section 48 of IRPA. In *Baron*, Justice Marc Nadon found enforcement officer's degree of discretion to defer is significantly limited by Section 48(2) of the Act which requires the execution of removal "as soon as is reasonably practicable."

[29] The language of section 48 does not allow for an indefinite deferral. Given this narrow discretion, the Officer is complying with his duty by refusing to consider an indefinite deferral.

[30] The Applicant also requested the delay to allow for a reassessment of risk or until conditions in Somalia improve.

[31] The Applicant submitted country conditions had worsened in the two months before the deferral request and the result was increased risk to the Applicant in regards to a return to Somaliland. In support of his submission he provided affidavits, a petition and documentary evidence of risk in Somaliland via Mogadishu. The affidavits address risk to the Applicant in Somalia. The documentary evidence identifies Somaliland as more secure than Somalia but facing a rising threat of instability.

[32] Finally, the Applicant submits the Respondent's last-minute change of travel arrangements in September of 2009 confirms the original travel arrangements posed a risk and the Officer's refusal to deny the deferral request was therefore flawed.

[33] The Respondent submits the Officer's decision was reasonable. He is legally bound to execute removal orders expeditiously. The Respondent adds the Officer was not obliged to assess risk to the Applicant on return. He considered the material before him and came to a reasonable decision.

[34] The question I have to answer is whether the Officer should have considered the risk inherent in the travel arrangements made for the Applicant? In my view he should have.

[35] The Minister's Delegate had considered the risk to the Applicant on removal to Somalia and found that, on the evidence before her, the Applicant did not face any greater risk than other Somalis. That assessment was made as of June 30, 2009. In coming to her conclusion, the Minister's Delegate acknowledged the situation in Somalia was "volatile".

[36] The Officer in his decision on September 21, 2009 stated he considered the Applicant's evidence and documentation and stated it would not influence the balance of risk conducted by the Minister's Delegate. The Officer makes no reference to the travel arrangements for the Applicant in Somalia.

[37] The issue raised in *Aden* was the risk applicants would face on arrival in Mogadishu and the travel from there to their ultimate destination in Somalia. The documentary evidence adduced, particularly the recent travel advisories, established the possibility of serious risk to that applicant such as to establish the prospect of irreparable harm. *Aden* involved a stay application contemporary with the Applicant's deferral request but does not appear to have been brought to the Officer's attention.

[38] After this issue was raised in this Applicant's stay application, the travel arrangements for the Applicant were changed to avoid Mogadishu by routing him to Bossao in the north of Somalia.

[39] In *Baron* Justice Nadon referred to two earlier decisions. He reiterated what he stated in *Simoës v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936 at para. 12 that

“... a removal officer may consider various factors such as illness, other impediments of travelling, and pending H & C applications that were brought on a timely basis but have yet to be resolved...” (emphasis added). Given the very different aspects of “illness” and “pending H&C applications”, I take it that “other impediments of travelling” may involve circumstances other than an applicant’s personal circumstances.

[40] In addition, Justice Nadon endorsed, without reservation, Justice Pelletier’s description the limits of an enforcement officer’s jurisdiction to grant deferrals in *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682 at paras. 45 and 48, stating in part, at paragraph 51:

...  
The Minister is bound by law to execute a valid removal order and consequently, any deferral policy should reflect this imperative of the Act.  
...  
...deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. ...  
(emphasis added)

[41] I take from these findings that an enforcement officer, who regularly deals with and is knowledgeable about travel arrangements made to execute removal orders, may consider risk arising from the modality of those arrangements. Such a deferral is not to repeat the delegate’s risk assessment with respect to refoulement, but to decide whether to defer an order to reassess risks as they may emerge in volatile regions and only with respect to travel arrangements.

[42] In his submissions to the Officer, the Applicant's counsel quoted from the decision of Justice Frederick Gibson in *Saini v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 982 at para. 19:

I conclude that the "broad range of circumstances" that Madame Justice Simpson found to be contemplated by section 48 of the Immigration Act includes discretion to consider whether it is reasonable to defer the making of removal arrangements pending a risk assessment and determination. Accordingly, it follows that a removal officer may have regard to cogent evidence of risk in removal to a particular destination and as to whether or not an appropriate risk assessment has been conducted and evaluated, solely for the purpose of informing his or her discretion regarding deferral. (emphasis added)

[43] The Applicant has put the question of risk arising from travel arrangements before the Officer. It was incumbent upon the Officer to consider the risk arising from the travel arrangements for the purpose of informing his discretion regarding deferral.

[44] The Officer, in his reasons, makes no reference to any risk arising from the travel arrangements routing the Applicant through Mogadishu. In doing so, I find he failed to consider a central and important aspect of the deferral request, *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at para. 27.

[45] I conclude the Delegate's decision was unreasonable for his failure to address the risks inherent in the original travel arrangements made for the Applicant's removal.

[46] The travel arrangements for the Applicant were changed subsequent to the Officer's decision not to defer his removal. This would tend to suggest the Officer's decision rested on old facts.

[47] In light of the changed travel arrangements, the acknowledged volatility of the situation in Somalia and the passage of time since the June 30, 2009 risk assessment was conducted, it is appropriate new arrangements for Mr. Abadir Ali's repatriation be made.

[48] The application for judicial review succeeds.

[49] The Applicant has effectively achieved his objective of obtaining a deferral of his September 22, 2009 removal. Any request for further deferral may include consideration of the risks he faces on his journey to his final destination within Somalia. To be clear, this relates to risk arising from travel and it does not include a new risk assessment concerning refoulement to Somalia.

[50] Neither the Applicant nor Respondent has proposed a general question of importance for certification.

### **Conclusion**

[51] The application for judicial review is granted.

[52] I make no order for certification of a general question of importance.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. The Application for judicial review is granted.
2. I make no order for certification of a general question of importance.

“Leonard S. Mandamin”

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Judge

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

**DOCKET:** IMM-4721-09

**STYLE OF CAUSE:** ALI ABADIR and THE MINISTER OF PUBLIC  
SAFETY AND EMERGENCY PREPAREDNESS

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** APRIL 28, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** MANDAMIN, J.

**DATED:** JULY 30, 2010

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