

Federal Court



Cour fédérale

**Date: 20120928**

**Docket: IMM-7344-11**

**Citation: 2012 FC 1149**

**Ottawa, Ontario, September 28, 2012**

**PRESENT: The Honourable Madam Justice Gleason**

**BETWEEN:**

**MOHAMUD ABDULLA FARAH  
(AKA DAHIR OMAR SHIRE)**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant, whose actual name is Dahir Omar Shire, is a 24-year-old male citizen of Somalia. In this application for judicial review, he seeks to set aside the decision of September 9, 2011 made by a Senior Immigration Officer in which the Officer dismissed the applicant's Pre-removal risk assessment [PRRA] application. For the reasons set out below, I have determined that the Officer's decision is unreasonable and, accordingly, will be set aside.

**Background**

[2] The applicant and his family are from Somalia. Several years ago, they were accepted as refugees by the UNHCR and the United States, came to the U.S. and settled in Minnesota. The applicant dropped out of school in grade 10 and developed an addiction to crack cocaine. In 2007, he pleaded guilty to a charge of selling a controlled substance, crack cocaine. He spent 27 months in jail in Minnesota between 2007 and 2009. In 2009, he was released on parole, and while on parole in February 2010, was charged with a further count of illegal possession of crack cocaine. The applicant was scheduled to attend before a Minnesota Court for an omnibus hearing on August 6, 2010 but failed to appear. The Court issued a warrant for his arrest and set bail at \$100,000.00.

[3] Fearing he would be deported to Somalia by American authorities due to his drug conviction and possible conviction for the pending charges, the applicant fled to Canada on August 6, 2010. He presented a fraudulent passport at the port of entry and claimed to be Mohamud Abdullah Farah. He made a refugee claim three days later, in which he stated that he had entered Canada from Somalia, after having merely passed through the United States.

[4] On September 2, 2010, the Canada Border Services Agency [CBSA] arrested the applicant as a result of an investigation carried out by Citizenship and Immigration Canada into the fingerprints the applicant provided upon entry to Canada. These fingerprints showed him to be Dahir Omar Shire of Rochester, Minnesota, for whom a warrant for arrest was outstanding. The applicant was then placed in immigration detention.

[5] In a decision dated April 18, 2011, the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board] determined that the applicant was excluded from refugee protection by virtue of Article 1F(b) of the *Convention Relating to the Status of Refugees, 1951*, Can TS 1969 No 6 [Refugee Convention or Convention], as incorporated into section 98 of the *Immigration and Refugee Protection Act* SC 2001, c 27 [IRPA or the Act]. The Board held that the applicant's American drug conviction amounted to serious criminality, which disentitled him to protection. Section 98 of the IRPA provides that:

A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention Refugee or person in need of protection.

La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

Article 1F of the *Convention Relating to the Status of Refugees, 1951*, Can TS 1969 No 6 [ the Refugee Convention or Convention] states in relevant part that the Convention:

[...] shall not apply to any person with respect to whom there are serious reasons for considering that:

[...]

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

[...]

[...] ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :

[...]

b) qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiées;

[...]

[6] While the RPD determined that the applicant was excluded from protection by reason of serious criminality, it made some non-binding comments in its decision, indicating that if the applicant were returned to Somalia he would be a clear target for al-Shabaab,<sup>1</sup> a radical Islamist group in Somalia. The RPD also noted that the situation in Somalia was extremely unstable and urged that its observations be taken into account if the applicant sought other forms of protection in Canada (such as, for example, through a PRRA). The RPD wrote as follows in this regard:

The claimant, who has spent the last ten years of his life in North America, would be highly conspicuous in Somalia and in my view, a target for recruitment by el-Shabaab. He would also be vulnerable as a member of the Hamar Weyne, a minority clan in Somalia and as someone with no experience as an adult in Somalia. Should the claimant seek other forms of protection in Canada, I would urge this observation to be taken into consideration.

[7] On January 25, 2012, this Court dismissed a judicial review application made in respect of the RPD's April 18, 2011 decision on the applicant's refugee claim, holding that the Board's determination that the applicant had committed a serious crime was reasonable (*Shire v Canada (Minister of Citizenship and Immigration)*, 2012 FC 97, 212 ACWS (3d) 205). In non-binding *obiter* comments, however, Justice O'Keefe echoed the sentiments of the RPD regarding the nature of the risks that the applicant might face if returned to Somalia. Justice O'Keefe concluded his Reasons for Judgment as follows (at para 66):

A final comment should be made regarding the risk that the applicant would face if returned to Somalia. As stated by the Board, Somalia has been without effective government for two decades. Violence is rampant and more populous clans prey upon smaller ones, such as the applicant's. The applicant has little remaining family in Somalia and his father and two of his brothers have been killed by al-Shabaab. Having lived abroad for over a decade, the applicant would likely face severe difficulties if returned. However, the practical

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<sup>1</sup> Various different spellings are used for al-Shabaab in the record; the spelling used in the direct quotations is left as in the original.

effect of section 98 of the Act is that the applicant cannot obtain refugee protection [...] Permanent resident status is also not available to him [...] It is therefore recommended that the hardship of being returned, coupled with the lack of other available protection, be carefully considered in the review of any future immigration applications made by the applicant.

[Citations omitted.]

[8] Following the dismissal of his refugee claim by the RPD, the applicant made a PRRA application on June 20, 2011, in which he claimed that he would face risk of cruel and unusual treatment or punishment if returned to Somalia. Because he was disentitled to refugee protection pursuant to paragraph 113(d) of the IRPA, the applicant's PRRA was conducted on a limited basis, considering only whether, if returned to Somalia, he would face risk of torture or of cruel and unusual treatment or punishment within the meaning of section 97 of the IRPA.

[9] In support of his PRRA application, the applicant alleged that he would be targeted for recruitment by al-Shabaab as a young male returnee from the U.S., that he does not share that organization's radical views, has no desire to join al-Shabaab and would therefore risk abuse and torture by al-Shabaab members and, more generally, that he would be at risk of death or injury due to the volatile situation in Somalia and to his lack of affiliation to any clan.

[10] In a decision dated September 9, 2011, a Senior Immigration Officer dismissed the applicant's PRRA application, holding that an Internal Flight Alternative [IFA], or essentially a safe haven, was available to the applicant in Mogadishu. The Immigration Officer concluded that the applicant would not face risk of torture or risk to life or of cruel and unusual treatment or

punishment if he were returned to Somalia as he could safely reside in Mogadishu, where he had lived as a young child. The Immigration Officer premised the IFA finding principally on five news reports from Reuters, dated August 6, 11, 24, 27 and 31, 2011. These reports indicated that al-Shabaab had at least temporarily pulled out of Mogadishu and that, as a result, thousands of Somalis and the United Nations High Commissioner for Refugees [UNHCR] representatives were re-entering the city. The Reuters reports as well as a report from the Canada Security Intelligence service, dated July 2011, further indicated that rifts were developing between senior commanders in al-Shabaab, and, accordingly, that it had been weakened. The Immigration Officer also reasoned that the applicant faced no risk of recruitment by al-Shabaab because he had not yet been identified by al-Shabaab and did not possess an American passport, noting that the country documentation indicated that "... while the militants uniquely targeted Americans and English speaking disenfranchised American and English-speaking young men into its fold, they were also more valuable if they had an American passport" (Decision at p 9, Certified Tribunal Record [CTR] at p 11).

### **Analysis**

[11] In this application for judicial review, the applicant raises several arguments; however, only one needs to be considered, namely, the assertion that the Officer's determination is unreasonable because it ignores the bulk of the evidence before the Officer, which demonstrated that south-central Somalia and, in particular, Mogadishu, are extremely dangerous places, where civilians risk death due to the ongoing struggle between al-Shabaab and the Transitional Federal Government [TFG] forces. For the reasons set out below, I have determined that the Officer's finding is unreasonable because it was based on erroneous findings of fact made "without regard for the material before it"

as provided for by section 18.1(4)(d) of the *Federal Court Act*, RSC 1985, c F-7. The decision is premised on a handful of news reports that detail what is described in one report as a “tactical move” by al-Shabaab and from these limited sources unreasonably concludes that the applicant would face no forward-looking risk if he were returned to Somalia. This conclusion ignores the bulk of the evidence before the Officer, including the full content of those news reports, and, moreover, ignores the history of strife in Somalia, that was detailed at length in the evidence before the Officer.

[12] In this regard, in addition to voluminous discussion of the turmoil that has faced Somalia over the past two decades, the following evidence regarding recent conditions in Somalia was before the Officer:

- The Amnesty International 2011 Somalia Report which indicates that only part of Mogadishu is controlled by the TFG, that armed groups are continuing to carry out “unlawful killings, torture and forced recruitment”, that there are ongoing indiscriminate attacks in Mogadishu and that humanitarian organizations are having to restrict operations (CTR at pp 126-128);
- An April 29, 2011 report from the UNHCR noting the “deteriorating security situation” resulting in large-scale displacement of citizens (50,000 civilians fled Somalia in the first quarter, double from a year earlier) (CTR at pp 137-138);
- A statement by Human Rights Watch in March 2011 that “Somalia is in the throes of one of the worst upsurges in violence in recent years.” (CTR at p 194);
- The 2010 Amnesty International report noting that the organization is

[...] concerned at the widespread violations of international humanitarian law and human rights law, including war crimes, and the dire humanitarian situation that civilians face in southern and central Somalia. Civilians are at high risk of being killed and injured in indiscriminate attacks by all parties to

the internal armed conflict, and as a result of a situation of generalized violence and collapse of the rule of law... Somalia's capital Mogadishu has since 2007 been the epicentre of armed conflict between the Transitional Federal Government (TFG) of Somalia and its allies, and the armed Islamist groups al-Shabab and Hizbul Islam. Since 2008, al-Shabab has extended its control to most of the territory in south and central Somalia, including major towns, but heavy fighting and attacks continue in Mogadishu. (CTR at p 220);

- The United States Department of State Human Rights Report on Somalia, dated April 8, 2011, describing a “worsening human rights situation” in Central and Southern Somalia due to al-Shabaab control (e.g. “arbitrary killings, kidnappings, torture, rape, amputations, and beatings; official impunity; harsh and life-threatening prison conditions; and arbitrary arrest, deportation, and detention”) (CTR at p 147);
- An October 2010 Amnesty International Briefing that refers to Mogadishu as the “epicenter of armed conflict” between fighting factions and discusses the huge affect this fighting is having on civilian population, including the cutting off of deliveries of humanitarian aid (CTR at p 220);
- A 2010 report from the UNHCR on Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia which states that there is no available IFA in southern or central Somalia (CTR at p 270);
- A 2010 Human Rights Watch Report describing how young men are fleeing Mogadishu due to threats against their lives for refusing to join al-Shabaab (see e.g. CTR at p 343);
- A January 2010 report of the Representative of the United Nations Secretary General on the human rights of internally displaced persons indicating that the Representative was unable to travel to central and southern Somalia due to the instability and lack of security in the region (CTR at p 376); and



- A 2010 report from Minority Rights Group International which highlights the vulnerable position of minorities, especially in south and central Somalia, to violence (including beheadings, shootings, etc.) (CTR at pp 417-454).

[13] Indeed, approximately 800 pages of country documentation were before the Officer, of which only 16 pages of the Reuters reports addressed the recent developments in Mogadishu that led to the withdrawal of al-Shabaab from the capital. Given the history of volatile conflict in the country as a whole, and the Mogadishu region in particular, to rely on a single development that was only weeks old falls outside of the range of a reasonable conclusion, particularly in light of the evidence regarding the fate of other similar developments in the past. In this regard, the record before the Officer indicated that moments of stability have not been long-lived in Somalia during its conflict. For example, the March 2010 Amnesty International report before the Officer described how, following the appointment of a new President in 2009, 60,000 people returned to Mogadishu but “hopes of an improvement in the lives of civilians proved short-lived ... armed opposition groups ... launched a major offensive [and ever since] ... Mogadishu has been the scene of some of the most intense fighting and the security situation in the city has deteriorated significantly as a result” (CTR at p 357). This context needed to form part of the Officer’s consideration of developments described in the 2011 Reuters news reports he relied on.

[14] In addition, even if it had been appropriate to base his determination exclusively on the recent development mentioned in the August 2011 Reuters news reports, the Officer’s conclusions did not reasonably reflect the content of those articles. The articles contained the following statements regarding al-Shabaab’s withdrawal:

- “Analysts said they expected al Shabaab, which still controls large swathes of the south and central Somalia, to return to Mogadishu and adopt guerrilla tactics.” (CTR at p 15);
- A reference to the statement of the leader of al Shabaab (Sheikh Muktar Abu Zubeir) that, “We didn’t abandon the fighting and we aren’t weak. We are now launching a new phase of fighting against you which will prove to be your end.” Indeed, one of the headings in this article is “Mogadishu Unsafe”. The article goes on to report that “Government troops and AU [African Union] peacekeepers acknowledge they do not control all of Mogadishu and there are still some pockets of resistance”. (CTR at p 15);
- “The al Qaeda-inspired al Shabaab rebels had been waging a four year insurgency against Western-backed government troops and African Union peacekeepers, before retreating from the capital earlier this month, in a move they said was tactical. Analysts believe the militants will soon re-emerge in the capital as a guerrilla fighting force to carry out high-profile suicide bombings.” (CTR at p 17);
- “Thousands of Somalis have been returning to Mogadishu since the Islamist rebels announced their withdrawal, but the capital is still suffering from the effects of years of warfare. Two children were killed on Saturday after they mistakenly played with a landmine in the Karan district of Mogadishu which al Shabaab had abandoned. Nine people were also wounded, witnesses said.” (CTR at p 18);
- The title of one article was, “Mogadishu Celebrates Al-Shabab Withdrawal But Militants Nearby” [emphasis added]. The article goes on to describe how al-Shabaab executed three men through the use of a firing squad in northern Mogadishu and

notes that “Al-Shabab said the retreat was a strategic move and vowed to remain nearby and continue its efforts to topple the United Nations-backed government.”

(CTR at p 22);

- Another article entitled “Mogadishu Remains Risky Despite Al-Shabab Withdrawal” notes that “the Somali capital is still a dangerous place, including for aid workers [but] [d]espite that, many Somalis are traveling to the city hoping to find food and water in a country hit by drought and famine.” The article continues, “While the withdrawal of al-Shabab has allowed greater access to parts of the city, the Somali capital cannot be called safe.” A representative from Doctors Without Borders is quoted as stating that the withdrawal “has left a security vacuum of sorts. And so, even, say, during the height of the conflict in Mogadishu, as dangerous as that city was, there was a clear front line even if there might be various targeted killings and bombings within TFG areas ... There are also private militias related to different clans and so on. And working in those circumstances I actually find almost as dangerous, if not more dangerous, than when there was a front line running through the city.” The article notes, “Now pro-government forces have a much wider area to control without any additional troops. That allows other armed groups to act more freely.” (CTR at p 24);
- The article dated August 26, 2011 notes, “Somali Islamist rebels have beheaded at least 11 civilians in the capital in the past two weeks, a campaign of terror that residents said Friday is designed to show the insurgency can still act in Mogadishu after withdrawing from their bases there earlier this month ... Residents – some to[o] terrified to give their names – appealed to the Somali government and AU

troops to secure their neighbourhood. Although al-Shabaab has pulled back, individual fighters are still active in the city and gunfire is still common”. (CTR at p 26); and

- “Somalia’s struggling government hailed the rebels’ exit as a major victory but al Shabaab said their withdrawal was just tactical and promised to return, and analysts said the exit could herald a wave of al Qaeda-style suicide attacks.” (CTR at p 32).

[15] Thus, contrary to the Officer’s conclusions, the Reuters August 2011 articles reveal a situation of uncertainty and ongoing risk. While Somalis were returning to the capital, the documentation indicates that this was in large part the result of extreme famine and drought elsewhere (see e.g. CTR at pp 29-32). As noted by a senior U.S. official travelling with the Vice President’s wife in Somalia in August 2011 who was quoted in one of the articles, “I think this is one of the riskiest operating environments of any humanitarian operation in the world right now so I think sure, there’s risk of an uptick in the fighting, there are all sorts of risks” (CTR at p 32).

[16] As is clear from the preceding paragraphs, the vast majority of the country documentation evidence shows Mogadishu to be an incredibly dangerous place. In his reasons, the Officer ignored this greater context and, moreover, did not even accurately capture the key message in the articles he relied on which indicated that notwithstanding al-Shabaab’s withdrawal from the capital, the situation in and around Mogadishu remained extremely volatile and unsafe.

[17] The lack of safety in Mogadishu has been recognised in two recent judicial determinations and in a recent decision of the RPD.

[18] In April of this year, Chief Justice Blais of the Federal Court of Appeal was faced with a similar issue in respect of a motion for a stay of removal to Somalia of a young man in similar circumstances to the applicant's (in *Mohamed v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 112 [*Mohamed*]). Relying on virtually the same country evidence as was before the PRRA Officer in this case, Chief Justice Blais found that an IFA would be open to the applicant in northern Somalia as it appeared to be relatively stable. However, he noted that "the evidence provided by both sides demonstrates that the situation is much more dangerous and unstable in the south and the area surrounding the Somali capital, Mogadishu" and concluded that "the situation is particularly difficult in southern and central Somalia, including Mogadishu [...]" (*Mohamed* at paras 19 and 25).

[19] Similarly, the case of *Sufi and Elmi v United Kingdom*, Applications nos 8319/07 and 11449/07 from the European Court of Human Rights [ECHR] (28 June 2011), while not binding on me, is informative. In that case, the ECHR was confronted with applications from two male Somali citizens who asserted that their removal to Somalia from the United Kingdom would place them at real risk of ill-treatment in violation of Article 2 and 3 (the right to life and the prohibition of torture, respectively) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222, ETS no 5, and would also interfere with their rights under Article 8 of that Convention (right to respect for private and family life). The Court "conclude[d] that the violence in Mogadishu is of such a level of intensity that anyone in the city, except possibly those who are exceptionally well-connected to 'powerful actors', would be at real risk of treatment prohibited by Article 3 of the Convention" (*Sufi* at para 250).

[20] Finally, and notably, in the only RPD decision in the past year dealing with Somalia (RPD File No VB0-04912, [2011] RPDD No 26), the Board found the applicant to face a well-founded fear of persecution at the hands of al-Shabaab. In an oral decision of December 2011 (with written reasons following in January 2012), the Board relied on the UK Country of Origin report and found at paragraph 13 of its decision that:

... the main threat to the Transitional Federal Government (TFG) is posed by Al-Shabaab. It is on the U.S. Terror List and is accused of having links with Al-Qaeda. The group controls much of southern and central Somalia, including parts of Mogadishu. Al-Shabaab is reportedly led by a shadowy figure who goes by the name of Abu Zubeyr. This group's professed aim is to spread Islam across the globe.

[Emphasis added]

Again, although not binding upon me, it is telling that a decision rendered in the months that followed al-Shabaab's withdrawal from the capital found that there was ongoing risk in Mogadishu.

### **Conclusion**

[21] Thus, the Officer's decision was unreasonable because it was made without regard to the evidence before him. That evidence indicated that Mogadishu is dangerous and therefore cannot constitute an IFA. The Reuters reports of August 2011 did not indicate otherwise. The conclusion that Mogadishu is not an IFA also finds support in several recent decisions.

[22] Because the Officer premised his decision on the unreasonable determination that Mogadishu was an IFA for the applicant, the Officer failed to consider and analyze whether the risk posed to the applicant in returning to Mogadishu was a generalized one within the meaning of s.97 of the IRPA and, whether, if so, the applicant could nonetheless be returned to Somalia without violating his rights under section 7 of the *Canadian Charter of Rights and Freedoms*, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c 11 (UK), RSC, 1985, Appendix II, No 44. (The issue of whether a *Charter* analysis is required in these circumstances is currently pending for decision before the Federal Court of Appeal in *Mohamed*.)

[23] Accordingly, the PRAA Officer's decision will be set aside and the matter remitted to a different officer for re-determination. No question was proposed for certification and none arises in this case as my decision is closely tied to the facts and centers on the way in which the Officer reasoned.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is allowed and the decision of the Officer is set aside;
2. The applicant's PRAA Application shall be remitted for re-determination by a different PRRA Officer;
3. The parties shall be afforded the opportunity to file additional evidence and to make additional submissions before the new PRRA Officer regarding the situation in Somalia in existence at the time of the re-determination;
4. No question of general importance is certified; and
5. There is no order as to costs.

"Mary J.L. Gleason"

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Judge



**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-7344-11

**STYLE OF CAUSE:** *Mohamud Abdulla Farah, aka Dahir Omar Shire v The  
Minister of Citizenship and Immigration*

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 11, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** GLEASON J.

**DATED:** September 28, 2012

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