

Federal Court



Cour fédérale

Date: 20150908

Docket: IMM-6462-14

Citation: 2015 FC 1052

Toronto, Ontario, September 8, 2015

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ABDALLA ALI DIRIE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD] dated July 28, 2014 [the Decision], determining that the Applicant, Mr. Dirie, was neither a Convention refugee nor person in need of protection pursuant to sections 96 and 97 of IRPA;

[2] This application is dismissed for the following reasons.

I. Background

[3] The Applicant is a citizen of Somalia who asserts he is a member of the Shekhal clan and a Sufi Muslim. He contends that, while growing up in Mogadishu, Somalia, his family was targeted by majority clans in Somalia. His 10 year-old brother was kidnapped by the Abgaal clan in October 1998 and, after two years, the family paid a ransom for his release. In 2002, the Applicant's father was killed by members of another clan in the family's grocery store.

[4] After his father's death, the Applicant left Somalia with his uncle and moved to Nairobi, Kenya. The two lived there without status. He contends that in 2008 another uncle was killed by an Al-Shabaab terrorist group in Mogadishu and that his sister was killed by a bomb attack in a nearby area in 2009.

[5] Near the end of 2009, while still in Kenya, the Applicant claims he had a public argument with an Al-Shabaab supporter, during which the Al-Shabaab supporter threatened his life. Fearing for his safety, the Applicant left Kenya in June 2010. He travelled through seven countries, and arrived in Mexico, where he was detained by Mexican immigration officials for fifteen days. He was released and entered the United States on July 25, 2010. Following initial detention by US immigration officials, the Applicant was released and then submitted a US refugee claim. He learned from his US lawyer in June 2012 that his US claim had been refused, following which the Applicant came to Canada on June 25, 2012 and sought refugee protection.

II. RPD Decision

[6] The RPD first addressed the Applicant's identity and, while it ultimately found he had established his Somali citizenship, the RPD had a number of credibility concerns arising from his failure to provide corroborating evidence. It noted the Applicant's failure to submit corroborating evidence from family members he was in contact with, including the uncle he had lived with, and that there were no documents to support that he spent seven years living with his uncle in Kenya and worked two jobs there. When he was questioned about the failure to provide such evidence, the Applicant responded he had forgotten, had not had time, hadn't thought about it, or had been too busy with work. Given that the Applicant had two years to obtain such evidence, the RPD found these explanations to be unreasonable and drew a negative inference as to his claim and his subjective fear of persecution.

[7] In reaching its Decision, the RPD considered the sworn statement of Shafi Yussuf, an identity witness who alleged he was the Applicant's cousin. The Applicant noted that Mr. Yussuf was present at the hearing but not questioned.

[8] The RPD accepted that the Applicant had been released from detention in the United States. It concluded that he had provided sufficient documents to US immigration officials to establish his identity as a citizen of Somalia. However, he had not taken the steps to provide similar documents to Canadian officials. The RPD drew a negative inference as to the Applicant's credibility, based on his failure to provide the record of the US proceeding or the resulting decision. Due to the serious circumstances, the importance of these documents in his

claim for Canadian refugee protection, and the fact he was represented by a US lawyer prior to departing for Canada, the RPD rejected his explanation, that he did not know why he did not have these documents, or that he did not receive them.

[9] Addressing the Applicant's detention in Mexico, the RPD also questioned the credibility of his evidence as to the circumstances of his release. It found that his testimony about his entry to and exit from Mexico had evolved in the course of questioning. The RPD found it implausible that, in a "post 911 security environment", he would be released in Mexico and able to board an airplane for travel to the US border, without a visa or a passport.

[10] Aside from the credibility concerns, the RPD found that the determinative issue was whether the Applicant had a well-founded fear of persecution were he to return to Somalia. The RPD noted that the Applicant identified as a member of the Shekhal minority clan, which was not mentioned as a minority clan considered to be at risk in the 2010 United Nations High Commission for Refugees [UNHCR] Eligibility Guidelines summarized in the Operational Guidance Note from the United Kingdom. This document also commented that returning Somalis belonging to minority groups were unlikely to face violence based on their ethnicity alone. Additionally, the RPD cited a May 2013 Danish-Norwegian Joint Report, which observed that clan based militias were no longer active in Mogadishu and that the clan had become a social rather than protective structure.

[11] The RPD also observed from the documentary evidence that Mogadishu was controlled by the Somali National Armed Forces [SNAF] and the African Union Mission in Somalia

[AMISOM] and that Al-Shabaab was not carrying out direct attacks on civilians or trying to retake Mogadishu. Al-Shabaab was mainly targeting government officials and those working for international organizations. These were changes that had occurred since the Applicant left Mogadishu in 2003.

[12] Further, the RPD found that the Applicant had not provided persuasive documentation to support his identity as a Sufi Muslim, which the Applicant argued placed him at specific risk from Al-Shabaab, nor his membership in the Shekhal clan. His evidence consisted of statements made by individuals who did not provide information as to how they were able to comment on his religious affiliation. The Board noted that the Applicant testified that he had an aunt and uncle living in Mogadishu and that he did not provide any evidence that they experienced problems there. When asked why he could not reside with one of them, the Applicant referred to religious issues but, when questioned further, did not address why religious issues would affect him but not his aunt or uncle and instead he focused on financial concerns.

[13] The RPD concluded that the Applicant had not provided persuasive evidence to support his allegation of fear of return to Somalia and that there was less than a mere possibility that he would be at risk should he return.

III. Issues

[14] The parties' submissions, as described below, raise the following two issues:

- A. Is the RPD's Decision reasonable, in particular in relation to its credibility findings and its assessment of the country conditions in Somalia?

- B. Did the RPD deprive the Applicant of procedural fairness by refusing to allow oral testimony by the identity witness Shafi Yussuf?

IV. Standard of Review

[15] The Applicant did not make any express submissions on the standard of review. The Respondent submits the RPD's conclusions are reviewed on the reasonableness standard, with which I agree, and that issues of procedural fairness are reviewed on the standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras 47, 50, 53, 55 and 62; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 52-62; *Juste v Canada (Minister of Citizenship and Immigration)*, 2008 FC 670 at paras 23-24; *Olson v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 458 at para 27).

[16] While there is undoubtedly considerable jurisprudential support for application of the correctness standard to procedural fairness issues, the recent decision of the Federal Court of Appeal in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, at paras 67-72 canvasses authority to the effect that some degree of deference should nevertheless be given to the decision-maker on some elements of the procedural decision. That decision does not resolve what Justice Stratas refers to as a "jurisprudential muddle" in this area, in part because it was not necessary to resolve the issue as the Court's conclusion was that, even on a standard of correctness, there was no basis to interfere with the applicable decision on the basis of procedural fairness.

[17] In the present case, for the reasons explained below, my conclusion is that the same analysis applies and that the duty of procedural fairness has been met even if the more stringent correctness standard is applied.

V. Applicant's Submissions

[18] The Applicant submits that the RPD's credibility determination based on an absence of corroborating documentation was unreasonable. He cites jurisprudence to the effect that implausibilities must exist, or some other valid reason to doubt credibility must be present, in order to rely on the absence of documentary evidence (see *Zheng v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1274 at para 20; *Ismaili v Canada (Minister of Citizenship and Immigration)*, 2014 FC 84 [*Ismaili*] at para 36; *Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12 at para 10).

[19] The Applicant argues that the RPD overlooked evidence from his family members that it found to be absent. He also points to the various documents from his US immigration claim that he submitted and contends the RPD unreasonably focused on the absence of other documents from this process and ignored the fact that the submitted documents corroborated his Canadian refugee claim. He contends that the plausibility findings made by the RPD about his travel through Mexico were unreasonable, as they represented speculation without an evidentiary basis.

[20] With respect to the findings of objective risk in Somalia, the Applicant submits the Decision was unreasonable because it was made without regard to the documentary evidence. He argues that the RPD should have considered his risk as an Al-Shabaab public critic due to his

argument in Kenya. He also refers to items in the Board's National Documentation Package [NDP] that identify the Shekhal as a minority clan and argues the RPD did not address this evidence that contradicts the RPD's conclusions based on the 2010 UNHCR Guidelines. The Applicant notes that the RPD relied not on the 2010 UNHCR Guidelines themselves but on a summary of the document found in the Operational Guidance Note from the United Kingdom. The 2010 UNHCR Guidelines document itself does identify the Shekhal clan as a minority.

[21] The Applicant also argues that the RPD was unreasonable in its conclusion that Al-Shabaab no longer carries out direct attacks on civilians in Mogadishu and that clan protection is no longer needed. He says this conclusion was based on a selective reading of the 2013 Danish-Norwegian Joint Report, which is a compilation of various opinions, some of which contradict the RPD's findings.

[22] Finally, the Applicant submits that he was denied procedural fairness because the RPD did not allow his cousin, Mr. Yussuf, to testify at the hearing. He argues that the RPD denied him the right to call a witness to provide evidence on identity, an issue from which the Board drew a negative credibility inference. The RPD denied the request to allow Mr. Yussuf to testify, because it was past 4:00 pm, and requested instead an affidavit from the witness. The Applicant notes the RPD said an affidavit would be sufficient because in the course of the testimony, it had become clear that parts of his story were fitting together, and argues his counsel agreed to submit an affidavit only on the strength of that reassurance.

[23] The Applicant relies on *Ayele v Canada (Minister of Citizenship and Immigration)*, 2007 FC 126 at para 13 and *Kamtasingh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 45 at para 13, in which it was held to be a breach of procedural fairness not to allow the testimony of a witness that would be relevant to a pertinent matter.

VI. Respondent's Submissions

[24] The Respondent argues that the RPD was reasonable in its negative credibility finding, as this finding was not based solely on the Applicant's inability to provide corroborating documents. Regarding his US asylum claim, the Respondent submits that the RPD was reasonable in drawing an adverse inference from the Applicant's failure to provide all documents. The fact that those documents that were submitted corroborate his Canadian claim does not eliminate the credibility concern arising from the absence remainder of the US documents.

[25] The Respondent also submits that the RPD was reasonable in its assessment of the country conditions in Somalia. On the subject of the Shekhal clan, the Respondent contends the 2010 UNHCR Guidelines only makes a single passing reference to the Shekhal clan and distinguishes it from other minority clans as being "closely associated" with a majority clan. The fact the RPD relied on the UK Operational Guidance Note, and not the underlying 2010 UNHCR Guidelines, does not undermine the reasonableness of its finding that being a member of the Shekhal clan does not place the Applicant at risk.

[26] As for the Danish-Norwegian Joint Report, the Respondent argues the RPD's consideration of this document was not selective and that the prevailing direction of the opinions provided in this document are consistent with the RPD's conclusions. The Respondent also notes that the Applicant did not present any evidence to suggest his family living in Mogadishu experienced any problems.

[27] On the procedural fairness issue, the Respondent refers to jurisprudence to the effect that, where no objection is raised during the hearing about the manner in which the hearing is conducted, this can result in an implied waiver of any procedural fairness concern. The respondent says the Applicant agreed with the Board's suggestion to take the witness's evidence via affidavit and, thus, the failure to object at the hearing constitutes an implied waiver of any procedural fairness breach that might have occurred. The Respondent also argues that Mr. Yussuf's affidavit was accepted, as was the Applicant's identity as a citizen of Somalia.

VII. Analysis

[28] Addressing first the RPD's negative credibility findings, I am conscious of the authorities cited by the Applicant to the effect that the sworn testimony of a refugee claimant is presumed to be truthful, unless there is a reason to doubt its truthfulness, and that a lack of documentary evidence is a valid consideration for the purposes of assessing credibility only when there is such a reason (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) at para 5; *Zheng v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1274 at para 20; *Ismaili* at para 36).

[29] However, I do not consider these principles to assist the Applicant in this case. The RPD's adverse credibility conclusions were made in the context of its analysis of the Applicant's identity. In that analysis, the RPD was expressly guided by section 106 of IRPA, which requires it to take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity and, if not, whether the claimant has provided a reasonable explanation for the lack of documentations or has taken reasonable steps to obtain it.

[30] The RPD referred to the requirements of section 106 and sought from the Applicant his explanations for the lack of documentation, which explanations the RPD found to be unsatisfactory. While the RPD ultimately found that the Applicant had on a balance of probabilities established his Somali citizenship, it nevertheless concluded that the credibility concerns identified in this analysis detracted from the overall credibility of the Applicant's claim for refugee protection.

[31] I agree with the position of the Respondent that, reading this portion of the Decision as a whole, it is apparent that the RPD's conclusion was that the lack of effort by the Applicant to obtain corroborating evidence of his identity undermined the credibility of his assertion that he had a subjective fear of persecution. The RPD considered the Applicant's actions, or lack thereof, to be inconsistent with his assertion of subjective fear. In that respect, the analysis is similar to that in *Byaje v Canada (Minister of Citizenship and Immigration)*, 2010 FC 90, in which Justice Mosely held it was not a case of the RPD erring by requiring documentary evidence to corroborate un-contradicted testimony. Rather, the RPD member had found that the

claimant's actions, such as failure to report threats and incidents that were supportive of her claim, were not consistent with the events of her story.

[32] This aspect of the RPD's reasoning is also responsive to the Applicant's argument that the RPD erred by stating that the Applicant failed to provide corroboration of his identity from his family. The Applicant notes that the documentary evidence submitted following the hearing included such evidence from members of his family. However, the RPD's conclusion on this point relates to the efforts that the Applicant had made as of the time of the hearing, when he was questioned by the panel in respect of the lack of action on his part and responded that he perhaps "forgot and had been too busy with work and has not had time to get information".

[33] I find it reasonable for the RPD to have concluded that the Applicant's actions demonstrate a lack of subjective fear of persecution in Somalia.

[34] I can also find no error in the RPD's adverse credibility assessment based on the Applicant's failure to provide evidence of the US refugee proceedings and their result. The Applicant argues that the provision of evidence as to his documentary submissions to the US authorities, which contain information consistent with his Canadian claim, should have been sufficient. However, I see no element of unreasonableness in the RPD's reasoning that the documents he failed to provide could have undermined his Canadian claim, such as by indicating that he gave testimony at his US hearing that was inconsistent with his Canadian claim.

[35] In my view, the RPD's treatment of the Applicant's evidence surrounding his Mexican detention is somewhat more problematic. Its finding that it is not plausible that the Mexican authorities provided the Applicant with a document that allowed him to remain in Mexico without restriction for thirty days, and that he used the Mexican document to travel, is a plausibility finding that is unsupported by any evidence. However, the RPD's findings regarding the Mexican detention are only one element of its overall analysis leading to its adverse credibility conclusions, and I do not consider any error by the RPD in considering this aspect of the Applicant's claim to be sufficient to conclude that its overall credibility assessment is unreasonable.

[36] Turning to the RPD's treatment of the county condition documentation, the Applicant argues that the RPD is guilty of "cherry-picking" evidence from the NDP that supports its conclusions, while ignoring other probative evidence that would undermine its conclusions. In response, the Respondent argues that the weighing of county condition evidence is an area where considerable deference is owed to the RPD and that it is the Applicant who is "cherry-picking" by attempting to identify immaterial elements that conflict with the reasonable conclusions drawn by the RPD based on the weight of the overall documentary evidence.

[37] The Applicant is correct in pointing out that, in analyzing the evidence in the 2010 UNHCR Guidelines, the RPD relied not upon the original of these Guidelines but upon the summary contained in the UK Operational Guidance Note. However, this does not undermine the RPD's finding that the UNHCR has identified a series of groups it considers to be at risk as minority clans and that the Shekhal clan is not on this list. The list of minority clans recited by

the RPD is the list that the UNHCR Guidelines refer to as vulnerable. While the Applicant is correct that the UNHCR Guidelines, in a separate section, refer to the “Sheikhaal” clan as being considered a minority, that reference is in the context of a list of minorities that are closely associated with specific majority clans.

[38] The Applicant also notes the RPD’s reliance on the 2013 Danish-Norwegian Joint Report to support its conclusion that Al-Shabaab no longer carries out direct attacks on civilians in Mogadishu and that clan protection is no longer needed. He refers to other portions of the Joint Report that refer to ongoing risk to civilians from Al-Shabaab and ongoing relevance of clan protection. The Applicant notes that the Joint Report is a compilation of opinions from different organizations and highlights in particular opinions expressed by organizations described in the Joint Report as NGO (B) and Hakan Bilgin, IMC.

[39] The description of the opinions of NGO (B) does refer to reliance on the clan for protection and to the fact that, to some extent, Mogadishu is divided into areas where different clans are dominating. However, it also includes the statement: “However, today people can freely move between all areas irrespective of clan affiliation”.

[40] Similarly, Hakan Bilgin, IMC is stated to have disagreed with the proposition that clan protection is no longer an issue in Mogadishu. However, this excerpt concludes with the statement: “However, Hakan Bilgin, IMC, did agree that members of minority clans and ethnic minority groups are not more at risk of being attacked than members of larger clans, especially if they are influential. Hakan Bilgin, IMC, stated that this development is a very positive step in the

right direction”. This is consistent with the overall import of the opinions in the Joint Report related to clan protection, that it is not as significant a feature of life in Somalia as it once was.

[41] NGO (B) is also described as commenting that the number of assassinations by Al-Shabaab goes up and down and that some of their attacks are motivated ideologically rather than financially, such that anyone speaking out against them is at risk. However, NGO (B) also refers to Al-Shabaab being in a more difficult financial situation than ever, which is again consistent with the overall import of the opinions in the Joint Report, that the influence and capacity of Al-Shabaab are reduced from what they once were.

[42] In identifying the above references to the country condition documentation, I am conscious that the Court’s role in judicial review is not to reweigh the evidence and particularly not to find support for the RPD’s conclusions in evidence that was not referenced by the RPD. However, while the RPD is not required to reference every piece of evidence that it received that is contrary to its finding, the more important the evidence that is not referred to, the more willing a court may be to infer that the evidence was overlooked (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at paras 16-17). As such, the above analysis is intended to consider in context the evidence relied on by the Applicant in support of its argument, to assess whether such evidence can be characterized as sufficiently significant or contrary to the RPD’s conclusions as to invoke the sort of inference referred to in *Cepeda-Gutierrez*. That analysis does not lead to such an inference. Rather, my conclusion is that this component of the RPD’s reasoning is reasonable and within the range of acceptable outcomes.

[43] Finally, I have considered the procedural fairness argument raised by the Applicant. The challenge for the Applicant in arguing that he was unfairly denied the opportunity to have Mr. Yussuf testify in person is the fact that he was represented by counsel, who agreed that this evidence be provided in writing rather than orally. This can hardly be characterized as a denial of the opportunity to have the witness testify in person, as the transcript of the hearing demonstrates that the RPD did not impose this result. Rather, the panel member raised the possibility of receiving the evidence by affidavit and asked the Applicant's counsel if this was agreeable to him, and counsel confirmed that it was. The Respondent relies on *Sayeed v Canada (Minister of Citizenship and Immigration)*, 2008 FC 567 at para 23, for the proposition that counsel's failure to object to a procedure at a hearing represents an implied waiver of any breach procedural fairness. As the present case represents an express agreement to the procedure proposed by the RPD, it makes it that much more difficult to see how the Applicant can now raise an objection to such procedure.

[44] I have considered the Applicant's argument that his counsel's agreement was predicated on the statement by the RPD member that "... in the course of the testimony in the last hour or so ... it's come clear to me that, you know, parts of his story are fitting together". However, I cannot conclude that the Applicant's counsel was entitled to rely on this relatively vague statement by the RPD member to draw any particular conclusions as to which, if any, portions of the Applicant's claim it was prepared to accept.

[45] Also, the RPD did admit Mr. Yussuf's sworn statement into evidence and did ultimately accept that the Applicant had established his identity as a citizen of Somalia. I note that Mr.

Yussuf's evidence refers not only to the Applicant's identity as a Somali national but also to his membership in the Shekhal clan. The RPD's conclusion on this issue was that the Applicant had provided no persuasive documentation to support his identity as a member of this clan, other than statements from individuals submitted in support of his identity as a Somali citizen. It is difficult to conclude that the provision of Mr. Yussuf's evidence orally would have changed this assessment by the RPD. However, given the RPD's conclusions, based on the country condition documents, as to the lack of objective risk represented by membership in the Shekhal clan, more compelling evidence as to such membership by the Applicant could not have changed the outcome of the hearing.

[46] Whether applying a reasonableness or correctness standard, I find no breach of procedural fairness by the RPD.

[47] Having considered the arguments raised by the Applicant, I find no basis to interfere with the Decision by the RPD. This application is therefore dismissed. Neither of the parties raised any issue of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6462-14

STYLE OF CAUSE: ABDALLA ALI DIRIE v THE MINISTER OF
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