

Federal Court



Cour fédérale

Date: 20171018

Docket: IMM-1688-17

Citation: 2017 FC 926

Ottawa, Ontario, October 18, 2017

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

HUSSEIN MUHAMED MAALIM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of a decision by the Refugee Appeal Division [RAD] rejecting the appeal of a Refugee Protection Division [RPD] decision that the Applicant is not a refugee or a person in need of protection.

II. Background

[2] The Applicant is a Somali who alleged that:

- as a member of a minority light-skinned ethnic clan, the Begedi, he was discriminated against by the larger tribe, the Hawiye;
- there was no state protection for him or his family;
- the Hawiye attacked him and his family, took their farmland, beat him unconscious, threatened and extorted him and his mother, and killed his mother;
- he is a member of the Sufi religion, a denomination forbidden by Al Shabaab who controlled his home village;
- he fled to the United States in February 2015 where his refugee claim failed and he entered Canada illegally; and
- he would be killed if he returned to Somalia, either by Al Shabaab or the Hawiye.

[3] The RPD had significant credibility concerns because of inconsistencies between his testimony, his Basis of Claim [BOC], the declaration and interview with CBSA, and the US asylum claim documents.

[4] The RPD found the Applicant not to be credible and that alternatively he had an internal flight alternative [IFA] in Mogadishu.

[5] The RAD confirmed the RPD's conclusion but from a slightly different perspective.

[6] The RAD's key findings relevant to this judicial review are:

- The failure to provide the Applicant with a working recording of the RPD hearing was neither required by statute nor a breach of natural justice. The RAD also concluded that natural justice would only be infringed if the decision maker did not have a working copy. The Applicant had also not requested a working copy once it was discovered that his was blank.
- The requirements of s 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, had not been met and as a consequence, there was no basis to admit fresh evidence or hold an oral hearing.
- The Applicant had adequate time to prepare, and the new tighter timelines for filing refugee claims did not require a different assessment of credibility.
- The Applicant's inconsistencies in respect of his marital status, his relationship with a female observer, and the number of his siblings were not irrelevant to a credibility assessment or identity determination.
- The RPD erred in concluding that the Applicant's mother had not been murdered and in concluding that the Applicant's failure to claim in the United States undermined his subjective fear of persecution.
- The RPD was correct in finding a viable IFA in Mogadishu.

III. Analysis

[7] The key issues in this judicial review are:

- the breach of procedural fairness or statutory requirements regarding the recording of the RPD hearing;

- the reasonableness of the RAD's credibility conclusions; and
- the reasonableness of the IFA conclusion.

[8] The standard of review is well established and not in issue. Procedural fairness is subject to a correctness standard while the appeal to the RAD from findings of the RPD is subject to reasonableness (*Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157) with considerable deference owed on matters of credibility and weight of evidence.

A. *Recording of RPD Hearing*

[9] The RAD erred, factually, in concluding that the Applicant (through counsel) had not asked for a working copy of the recording after realizing that the copy he had received was blank. Mr. Matas had requested a proper copy, but was delayed by the RPD questioning whether Mr. Matas was counsel, despite his name appearing on the Notice of Appeal.

[10] Additionally, the RAD took too narrow a view of the right to the recording when it focused on whether the decision maker had a copy of the recording rather than focusing on whether an appellant should have a copy. A recording is not solely for the benefit of the decision maker. As a matter of fairness, absent good reason, an appellant is entitled to a recording of the RPD proceedings.

[11] The RAD also erred in concluding that there was no statutory basis for providing a copy of the recording to an appellant. Rule 3(3)(g)(ii) of the *Refugee Appeal Division Rules*,

SOR/2012-257, specifically contemplates that an appellant would have access to any such RPD recording:

3 (3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:

...

(g) a memorandum that includes full and detailed submissions regarding

(i) the errors that are the grounds of the appeal,

(ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the appellant is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing,

(iii) how any documentary evidence referred to in paragraph (e) meets the requirements of subsection 110(4) of the Act and how that evidence relates to the appellant,

(iv) the decision the appellant wants the Division to make, and

(v) why the Division should hold a hearing under subsection 110(6) of the

3 (3) Le dossier de l'appellant comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

[...]

g) un mémoire qui inclut des observations complètes et détaillées concernant :

(i) les erreurs commises qui constituent les motifs d'appel,

(ii) l'endroit où se trouvent ces erreurs dans les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel ou dans la transcription ou dans tout enregistrement audio ou électronique de l'audience tenue devant cette dernière,

(iii) la façon dont les éléments de preuve documentaire visés à l'alinéa e) sont conformes aux exigences du paragraphe 110(4) de la Loi et la façon dont ils sont liés à l'appellant,

(iv) la décision recherchée,

(v) les motifs pour lesquels la Section devrait tenir l'audience visée au

Act if the appellant is requesting that a hearing be held.

paragraphe 110(6) de la Loi, si l'appellant en fait la demande.

[12] Despite these errors, the Applicant has not shown how access to the recording could possibly have made any difference to this judicial review. Having now had access to the recording, the Applicant cannot point to nor does he assert that anything in the recording could feasibly have made his arguments more fulsome or raise new grounds or even improve on the perspective of the facts.

[13] I therefore must conclude that the legal issue raised is entirely academic and cannot form the basis for quashing the RAD's decision.

B. *Credibility Conclusions*

[14] The Applicant's position is that the credibility conclusions were flawed because the RAD cannot accept some RPD findings, reject others, and then uphold the RPD's conclusions without making a conclusion as to overall credibility, particularly where there was no oral hearing.

The Respondent appeared to concede the point but relied on the IFA as definitive.

[15] However, the assessment of credibility is a complex process. Unless the RAD took into account irrelevant matters, it has considerable leeway in concluding on this issue. The issue of identity was still live at the RAD and therefore issues of the Applicant's siblings, his relationship with a female observer, and his marital status, while tangential to the main issues, are still relevant for credibility considerations.

[16] I find no basis for holding that the credibility determination was unreasonable.

[17] As to the Applicant's argument that the RAD erred in concluding that the new refugee process was irrelevant to credibility issues, such a sweeping proposition would be incorrect. Factors such as short timelines which may impact the work of obtaining corroborating evidence may have an impact on particular cases.

[18] The difficulty for the Applicant here is that there is no convincing evidence that the new process had any impact on the RPD or RAD decisions. The issue is an interesting one but in this instance it is academic.

C. *IFA*

[19] The IFA conclusion in this case is determinative of the refugee claim. The issue of the risk in being a member of the Begeledi clan was considered by the RAD, both in Somalia generally and in Mogadishu in particular.

[20] I am not persuaded that this conclusion is unreasonable. The finding of a viable IFA is therefore supportable and the Court will not intervene in this determination.

IV. Conclusion

[21] For all these reasons, this judicial review is dismissed.

[22] There are no questions for certification.

JUDGMENT in IMM-1688-17

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

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1688-17

STYLE OF CAUSE: HUSSEIN MUHAMED MAALIM v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: OCTOBER 10, 2017

JUDGMENT AND REASONS: PHELAN J.

DATED: OCTOBER 18, 2017

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