

Federal Court



Cour fédérale

Date: 20181219

Docket: IMM-1617-18

Citation: 2018 FC 1285

Ottawa, Ontario, December 19, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

ABDULKADIR FARAH HASSAN JESS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a national of Somalia who holds a passport from Djibouti. His claim for refugee protection in Canada was denied on the basis that he holds citizenship in Djibouti and can return there. In this judicial review, he argues that the Refugee Appeal Division (RAD) erred by rejecting relevant evidence and by not considering the citizenship laws of Djibouti.

[2] For the reasons that follow, this judicial review is dismissed as the decision of the RAD is reasonable. I also decline to certify the proposed questions.

Background

[3] The Applicant came to Canada via the United States and made a claim for refugee protection in January 2017. The basis of the Applicant's claim was his fear of being targeted by Al-Shabaab, a terrorist organization based in East Africa.

[4] The Applicant was employed by the World Health Organization and the United Nations (UN). He claims that in November 2016, he received a threatening phone call from a member of Al-Shabaab demanding that he pay 7% of his monthly UN salary to Al-Shabaab as a tax. When the Applicant did not comply, he says he was followed and someone put a gun to his head. When he was warned that he had to pay two months' tax to Al-Shabaab by the end of December 2016, he fled to Kenya.

[5] In August 2015, the Applicant was issued a passport by Djibouti. He claims that he obtained this passport in a "corrupted way" for travel purposes only, and did not attain citizenship in Djibouti as a result.

[6] The RPD noted that in his American visa application, he listed having citizenship in Somalia and in Djibouti and indicated that his passport was a regular passport issued by Djiboutian authorities. Based upon the evidence, the RPD concluded that it was more likely than not that he held Djiboutian citizenship.

[7] The Refugee Protection Division (RPD) found that the Applicant was not a Convention refugee or a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*. The RPD concluded that because he held a passport from Djibouti he could return there and therefore did not have a well-founded fear of persecution and did not face a personal risk of harm in Djibouti.

RAD decision

[8] In its decision of March 16, 2018, the RAD upheld the RPD's finding that the Applicant was not a Convention refugee or a person in need of protection.

[9] On appeal to the RAD, the Applicant argued that the RPD failed to take into consideration the fact that Djiboutian law does not grant nationality to a person who already has nationality in another country. Therefore, he argued his Djiboutian passport cannot be valid as he only holds Somalian nationality. In support of this, the Applicant relied upon the 1981 and 2004 Djibouti Citizenship Acts. The Applicant argued that, based upon these Acts, he cannot legally be a citizen of Djibouti and he cannot return there.

[10] The Applicant was unable to produce evidence from Djiboutian authorities to prove that his passport was not valid. He attempted to introduce a letter from an organization called *La coalition djiboutienne* stating that the Applicant was not a citizen of Djibouti. The RAD refused to accept this evidence.

[11] The RAD determined that the RPD did not err in its finding that the Applicant had Djiboutian citizenship. The RAD held that the RPD correctly found that the Applicant had submitted no evidence to support the allegation that Djiboutian passports are issued to non-citizens simply for travel purposes or that passport fraud exists in Djibouti.

[12] The RAD noted that the onus was on the Applicant to provide acceptable documents, in a timely manner, to establish the proof of his claim, and that a document issued by a foreign authority is presumed to be valid unless there is evidence to the contrary. The RAD found that the Applicant did not discharge this onus.

[13] The RAD further found that evidence from an expert on Djiboutian law should have been provided to properly interpret the 1981 and 2004 Citizenship Acts. In the absence of this evidence, there was no basis for the RAD to conclude that the RPD made an error in its assessment of the Djiboutian citizenship.

Issues

[14] I would frame the issues raised by the Applicant as follows:

- I. Did the RAD err in its rejection of the evidence presented on appeal?
- II. Did the RAD err in requiring expert evidence?
- III. Is there a question for certification?

Analysis

Standard of review

[15] The issues raised by the Applicant are reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[16] The RAD's interpretation of its home statute, specifically section 110(4) of the *IRPA*, is reviewed against the reasonableness standard in accordance with the presumption that an administrative agency's interpretation of its home statute should be shown deference by the reviewing court (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at para 74).

I. Did the RAD err in its rejection of the evidence presented on appeal?

[17] On appeal to the RAD, the Applicant sought to introduce a letter by the organization *La coalition djiboutienne* as well as extracts from the 1981 Djibouti Citizenship Act to prove that he is not a citizen of Djibouti. He argues that the RAD had to consider the 1981 legislation in order to properly understand the 2004 Djibouti Citizenship Act that was previously submitted as country condition evidence.

[18] The Applicant argues that the RAD erred by rejecting this newly introduced evidence by incorrectly applying section 110(4) of the *IRPA*.

[19] Section 110(4) of the *IRPA* states:

On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[20] With respect to this evidence, the RAD states as follows at paragraph 22 of its decision:

In the present case, the Appellant has not introduced into evidence the Act on nationality adopted by Djibouti in 1981. There are no detailed observations in his memorandum in order to establish that this Act meets the conditions set out in subsection 110(4) of *IRPA* and could be admitted as new evidence. Therefore, I find that this statute is not admissible.

[21] In *Singh*, the Federal Court of Appeal held that the explicit conditions set out in section 110(4) of the *IRPA* were required to be met, were inescapable, and left no room for discretion by the RAD (at para 35).

[22] The Applicant seeks to escape the application of section 110(4) by arguing that the RAD failed to distinguish between “information” and “documentary evidence”. He argues that the documents he sought to rely upon are information and not evidence, therefore the requirements of section 110(4) are not applicable.

[23] Further, the cases relied upon by the Applicant in attempting to escape the application of section 110(4), such as *R v Eddy*, 2014 ABQB 164, arise in the criminal context where there are different considerations for the receipt of evidence.

[24] The distinction the Applicant urges this Court to accept between “information” and “documentary evidence” in the application of section 110(4) of the *IRPA* does not overcome the clear direction from the Federal Court of Appeal in *Singh*.

[25] In any event, the letter the Applicant sought to introduce was found by the RAD to have no probative value since *La coalition djiboutienne* does not have any authority to make declarations concerning Djiboutian citizenship.

[26] The RAD determined that the extracts from the 1981 Djibouti Citizenship Act itself could not be admitted as new evidence, as they would need expert interpretation because they are foreign law.

[27] Both pieces of evidence were reasonably rejected by the RAD for failing to meet the strict criteria of introducing new evidence on appeal as outlined in section 110(4).

II. Did the RAD err in requiring expert evidence?

[28] The Applicant argues that, because the 2004 Djibouti Citizenship Act is referenced in the country condition documents, it did not need to be proven by expert evidence as it is simply information.

[29] At paragraph 21 of its decision the RAD found as follows:

Before Canadian Courts and Tribunals, foreign law is treated as a fact and must be proven. This requires the production of an official

copy of the statute in question. If the content and implications of the statute cannot be determined by reference to the words of the statute itself, expert evidence is required. No knowledge of foreign law can be imputed to a decision maker.

[30] This statement is consistent with *Xiao v Canada (Minister of Citizenship and Immigration)*, 2009 FC 195, where Justice de Montigny held that, “Foreign law must be proven as a matter of fact by the evidence of persons who are experts in the law” (at para 24). Justice de Montigny acknowledges that such a rule may be relaxed in the administrative context if there are clear foreign and domestic statutory provisions consistent with the totality of the evidence. This does not mean that administrative bodies can, however, simply dispense with the need for expert evidence when the meaning of the legal provisions is not clear on the record. As Justice de Montigny further states, “...[E]xpert evidence remains the most reliable way to prove foreign law, not only as to its existence but, more importantly, as to its meaning” (at para 24).

[31] As noted, there may be circumstances where the decision-maker may dispense with the need for expert evidence but in this case the RAD was not prepared to do so. Here, the Applicant was not just attempting to establish the existence of the legislation but, rather, was attempting to prove the meaning of the legislation to his circumstances. The RAD determined that this needed to be proven by expert evidence. This is a determination that fits squarely within the discretion of the RAD.

[32] The Applicant further argued that the principles of statutory interpretation that apply to Canadian legislation should likewise apply to Djiboutian law. He argues the 2004 Djibouti Citizenship Act should be considered remedial and inseparable from the 1981 version and

therefore they need to be considered together. This interpretative exercise is the very reason why the RAD determined that evidence from an expert in Djiboutian law was necessary.

[33] The RAD was reasonable in refusing to accept portions of the 1981 Djibouti Citizenship Act into evidence due to lack of expert evidentiary support.

III. Is there a question for certification?

[34] The Applicant proposes the following questions for certification:

Does the reference in Immigration and Refugee Protection Act section 110(4) to evidence refer only to documentary evidence referred to in Act sections 110(3) and (6) and oral evidence?

If so, is country condition information properly considered documentary evidence and subject to the requirement of section 110(4)?

[35] The test for certification was recently confirmed by the Federal Court of Appeal in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 where at paragraph 46 the court states, “The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance.”

[36] The Respondent disagrees that this is an appropriate case for a certified question since the question posed by the Applicant assumes that the additional evidence was the determinative factor. The Respondent argues that the determinative issue for the RAD was the interpretation of foreign law and not country condition evidence.

[37] I agree with the Respondent that the determinative issue for the RAD was not the interpretation of section 110(4), but rather the lack of expert evidence on the interpretation of the law of Djibouti.

[38] Here the Applicant did not attempt to introduce any expert evidence on the issue of citizenship under Djiboutian law, therefore the first question as it relates to oral evidence does not arise on the facts of this case. Accordingly, the question posed is hypothetical and does not meet the test to be certified.

[39] With respect to the second question, the interpretation of section 110(4) of the *IRPA* has been fully addressed in *Singh*. I therefore decline to certify this question as it does not arise on the facts of this case and is not of broad significance or general importance.

[40] I therefore decline to certify the questions posed by the Applicant.

JUDGMENT in IMM-1617-18

THIS COURT'S JUDGMENT is that

1. This judicial review is dismissed; and
2. I decline to certify a question.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1617-18

STYLE OF CAUSE: ABDULKADIR FARAH HASSAN JESS v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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APPEARANCES:

David Matas FOR THE APPLICANT

Brenda Friesen FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Matas FOR THE APPLICANT
Barrister and Solicitor
Winnipeg, Manitoba

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario