

Federal Court



Cour fédérale

Date: 20090529

Docket: IMM-2098-09

Citation: 2009 FC 561

BETWEEN:

ABDIKARUM ADEN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER

Lemieux, J.

Introduction and Background Facts

[1] On May 21, 2009, I stayed the Applicant's deportation to Somalia pending the determination of his application for leave and judicial review. These reasons express why I granted the stay.

[2] The underlying proceeding, to which this stay application is grafted, is the March 12, 2009 decision of pre-removal risk officer Sohal, (the PRRA Officer).

[3] The Applicant entered this country on December 31, 1988 and immediately made a refugee claim which for a number of reasons was not heard. He made a further refugee claim in February 2003. This claim was dismissed on February 25, 2004 on grounds of credibility – the Refugee Protection Division (the tribunal) did not believe his story of persecution.

[4] The tribunal went on to determine the Applicant's section 97 risks. It noted the DIR clan, which the Applicant said he belonged to, resides in North-western Somalia and "that area has a certain independence from the rest of the country". It also found this area was a viable IFA for the Applicant which was "accessible, not just reasonable". The tribunal determined the Applicant not in need of protection.

[5] Prior to the determination of his refugee claim in 2004, the Applicant accumulated a criminal record starting in October 1994, with a conviction of fraud over \$1,000 in connection with Social Services. As a result, he received a suspended sentence, an order of restitution in the amount of \$13,243.76 and probation for 3 years.

[6] On December 11, 2003, he was convicted of breach of probation and sentenced to a year of probation with an order of restitution, in the amount of \$2,400.

[7] He made an H&C application on October 30, 2006 without paying the required fees. They were paid later; the H&C application was referred to the local office of CIC on September 20, 2007. That application is still outstanding.

[8] On April 23, 2009, he made a deferral request on the grounds of his outstanding H&C application invoking the facts he had been in Canada for 20 years, was married with 5 children who depend on him for financial support. That deferral request was refused on April 27, 2009. No leave and judicial review has been sought in respect of that decision.

[9] The record also reveals:

- In 1995, the Applicant was charged with sexual assault for which he failed to appear in September 1995. A bench warrant was issued;
- That same year, he was charged with breach of probation for which he failed to appear and another bench warrant was issued;
- On December 2, 1997, a section 27 report was written in connection with his fraud conviction;
- On March 11, 2002, a warrant for his arrest was issued under the then *Immigration Act*;
- On February 4, 2003, a deportation order was issued against him on the grounds of his serious criminality relating to his fraud conviction;

- Prior to that deportation order, he was arrested by the Toronto Police on January 23, 2003. Apparently in 1996, he fled to Calgary; he said he returned to Ontario in September 2002 to clear up his charges but did not turn himself in until January 2003.

The PRRA Officer's decision

[10] The PRRA Officer identified a new risk – a change of circumstance – since the tribunal had rendered its decision. He feared persecution or death owing to the fact the Council of Islamic Courts (the Islamic Courts), which the Applicant described as an Islamic fundamentalist group, had in 2006 taken over much of the country and were currently at war with a powerless government in Somalia. The Islamic Courts was pushed back from Somalia's capital of Mogadishu when Ethiopian troops came to the aid of the government. However, the Islamic Courts recently regained control of several parts of the country and now is engaged in battle for the control of Mogadishu.

[11] According to the PRRA Officer, the Applicant's fear is based on the fact he is not an observant Muslim: 1) does not have a beard; 2) wears western clothes; 3) has a western haircut; 4) does not pray 5 times a day; 5) is opposed to women wearing the habit; and, 6) is against FGM. He fears he would be targeted by the Islamic fundamentalists because his opinion differs from theirs.

[12] In summary, the PRRA Officer made the following findings relying mainly on the most recent US DOS for 2008 and the UK Operational Guidance Notes (the UK Notes) issued December 2008, as well as the RPD's decision:

- 1) The Applicant is a member of the DIR clan and according to the RPD, he resided in Mogadishu when he lived in Somalia;

- 2) According to the UK Notes, the Applicant could not return to Mogadishu because he would face an indiscriminate risk of generalized violence there;
- 3) The UK Notes also recognized that those [individuals] affiliated to major clan families, their immediate clan groups and associated clans “should therefore be able to reside safely in an area outside of Mogadishu in which the clan is present”;
- 4) “As noted in the Applicant’s RPD decision, the RPD panel found that the Applicant could reside in the North Western part of Somalia since he was a member of the DIR Clan. With respect to the Applicant, as noted above, the security situation is better in the Northern part of Somalia. There is little evidence to show that the Applicant could not relocate to the aforementioned region or the Northwest where the DIR Clan reside, as noted in the RPD decision; and,
- 5) Indeed, I recognize that the conditions in Somalia are certainly not favourable for the Applicant; however, I am not satisfied that there is sufficient evidence before me to show that he would face a personalized risk under section 96 and/or section 97 of *IRPA* in the North and West regions of Somalia based on his personal profile of being a non-observant Muslim. In terms of the viability of an Internal Flight Alternative, the Applicant would be in an area where the Dir Clan resides as confirmed by the Encyclopedia Britannica; thus, I find that the Applicant would have a support network in Somalia.”

Analysis

[13] It is well established the Applicant, in order to obtain a stay of his removal to Somalia, had to establish: 1) a serious issue to be tried; 2) irreparable harm; and, 3) balance of convenience in his favour. For the following reasons, I am of the view the Applicant has discharged his onus for each of those three elements.

a) Serious issue

[14] I find at least the following serious issues flowing from the PRRA Officer’s findings:

- Did the PRRA Officer err in determining that the Applicant had a viable IFA in North Western Somalia? I agree with counsel for the Applicant that, insofar as the PRRA

Officer relied on the RPD's finding, he relied on dated material and insofar as the UK Notes are concerned, he relied on the documentary evidence without regard or analysis to the current actual situation in that area – “the facts on the ground”.

- A serious question arises whether much of his finding on this point was arrived at based on pure speculation of possible support. Where was he supposed to go to – which town? How did he determine accessibility and viability? How was he going to get there since he was to land in Mogadishu without escort?
- A third issue arises whether the PRRA Officer misapprehended the evidence before him or ignored it. This issue arises because there was evidence before him of social and political unrest in North West Somalia; evidence of open warfare, there or in surrounding regions, and evidence people in that region could barely sustain themselves. There was evidence the militias controlled much of the area;
- A fourth serious issue arises on his treatment of the Applicant's new fear based on his religious beliefs and the extent of the current control of Somalia's regions by the fundamentalists. The PRRA Officer's analysis of this fear seems inadequate.

b) Irreparable harm

[15] Irreparable harm is made out where an Applicant's life, liberty or safety might be at risk.

The documentary evidence adduced by the Applicant – particularly the recent travel advisories – establishes the risk of serious harm faced by the Applicant upon his return.

c) Balance of convenience

[16] In the circumstances, the balance of convenience favours the Applicant.

[17] Counsel for the Respondent relied on the Federal Court of Appeal's recent decision, in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, to argue balance of convenience favours the Minister. I am not prepared to hold that this case is like *Baron* or that the teaching in *Baron* necessarily trumps irreparable harm.

“François Lemieux”

Judge

Ottawa, Ontario
May 29, 2009

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2098-09

STYLE OF CAUSE: ABDIKARUM ADEN v. THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 21, 2009

REASONS FOR ORDER: Lemieux J.

DATED: May 29, 2009

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