

Federal Court



Cour fédérale

Date: 20130228

Docket: IMM-4253-12

Citation: 2013 FC 204

Ottawa, Ontario, February 28, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ABDI ABDULLAHI AHMED

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of an immigration officer (the officer) at the High Commission of Canada in Nairobi, wherein the applicant was determined not to be a Convention refugee within the meaning of section 96 of the Act.

[2] The applicant requests that the officer's decision be set aside and the application be returned for redetermination by a different officer.

Background

[3] The applicant and his brother, Habib Abdullahi Ahmed (who is pursuing a parallel judicial review in Federal Court file IMM-4254-12) are citizens of Somalia currently living in Kenya. They fled Somalia in 2007 after their father was killed by a militia group.

[4] The brothers were interviewed separately for their applications for permanent residence under the Convention refugee abroad class and the country of asylum class. The applicant was interviewed on February 15, 2012.

Officer's Decision

[5] A letter dated February 18, 2012, informed the applicant his application had been refused. The officer was not satisfied that the applicant was a member of either the Convention refugee abroad class or the country of asylum class.

[6] The officer's notes describe the rationale for refusal:

On balance, I am not satisfied that the PA is credible. The PA appears to have memorized his story and was unable to respond genuinely to the questions posed. The story the PA provided about the death of his father contradicts what his brother told me during his interview. The PA said that they saw their father's body lying in front of the shop while it was being looted by the militia. The PA told me the militia was standing outside the shop when they arrived.

The PA also has not sought protection from the UNHCR since arriving in Kenya and as such has no documents with which I can confirm his identity. I did not find the PA's explanation for why he has not gone to the UNHCR plausible.

[7] In the letter, the officer indicated the applicant had been given an opportunity to respond to the officer's concerns, but the officer had considered them and the assessment remained unchanged.

Issues

[8] The applicant submits the following point at issue:

Does this refusal breach the duty of fairness owed to the applicant on the basis that the visa office considered extrinsic evidence without disclosure and an opportunity to respond?

[9] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer breach procedural fairness?

Applicant's Written Submissions

[10] The applicant argues the standard of review for the duty of fairness is correctness.

[11] The applicant points out that the notes give no indication whether the applicant's brother was interviewed before or after the applicant. At the time of the applicant's written submissions, such notes had not been disclosed for the brother's application.

[12] The applicant argues the notes do disclose that there was no mention in the interview of the applicant or his brother's interview. Therefore, the officer's claim in the decision letter is untrue: the applicant had no opportunity to respond to these concerns.

[13] Due to not knowing what is in the notes in the brother's case, the applicant argues it is unclear whether there was an actual conflict between the content of the two interviews, but it is clear that fairness was breached. The Overseas Processing (OP1) Manual indicates the applicant must be made aware of the case to be met. The applicant had a legitimate expectation this process would be followed.

[14] Even if the interview of the brother was not extrinsic evidence, these concerns still should have been put to the applicant. This is a clear-cut case of a breach of the duty of fairness.

Respondent's Written Submissions

[15] The respondent agrees that the standard of review is correctness.

[16] The respondent argues that fairness was not breached. The officer put the credibility concerns to the applicant and the applicant has not provided any affidavit evidence suggesting what response he would have provided if given the opportunity.

[17] The respondent argues that even if fairness was breached, this matter should not be redetermined because the outcome is inevitable. The material in the respondent's affidavit shows

that the applicant was interviewed before his brother. The notes indicate the officer had many other concerns: the applicant's lack of identity documents, the failure to seek United Nations High Commission for Refugees (UNHCR) protection and the vague responses to questions about his travel and his father's death. Therefore, even before interviewing the brother, the officer had credibility concerns. Those concerns were furthered by the interview of the brother, but it is apparent the decision would not have been different even if the applicant had satisfactorily explained the perceived contradiction.

Applicant's Further Written Submissions

[18] The applicant argues the result of the application is not inevitable. The refusal letter identifies the contradictions in the undisclosed interview as a reason for refusal.

[19] The applicant also points out the notes (disclosed after the filing of the applicant's initial memorandum) of the two interviews show there was actually no contradiction. The brother did not say in his interview that he went in the shop, but that he saw their father's body in the shop, which is consistent with seeing the body while looking into the shop from outside. Both interviews were conducted through interpreters. The distinction between the body being outside the shop, or inside the shop at the front, could only be clarified through direct questioning, which did not happen.

[20] The applicant argues it was impractical to provide an affidavit with his response to the hypothetical disclosure of the brother's interview, given the time frame for leave and the difficulty of obtaining affidavits and notarization. However, an affidavit is not required since these

submissions have given a partial response to the disclosure and this Court is not expected to make the decision the officer would have made given full disclosure.

Respondent's Further Written Submissions

[21] The respondent argues the officer had several credibility concerns, of which the contradictory evidence was only one. The applicant's interpretation of the notes is based on confusing the two brothers. The letter was honest since the concerns in the second paragraph had been put to the applicant.

Analysis and Decision

Issue 1

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[23] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 798 at paragraph 13, [2008] FCJ No 995 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[24] **Issue 2**

Did the officer breach procedural fairness?

The respondent relies on the decision of Madam Justice Anne Mactavish in *Ali v Canada (Minister of Citizenship and Immigration)*, 2012 FC 710, [2012] FCJ No 886, for the proposition that non-disclosure of an interview is not a breach of the duty of fairness.

[25] I do not agree. As the very passage excerpted in the respondent's memorandum shows, Madam Justice Mactavish found in that case "there is thus nothing in the record to indicate that either applicant was unaware of the other's evidence or that they were unable to address Officer Mjanes' concerns" (at paragraph 44).

[26] In this case, the officer's notes did not disclose any opportunity granted to the applicant to respond to the concern of contradictory testimony, despite the letter's claim to the contrary. In *Ali* above, contradictory testimony between the two interviews was not part of the officer's reasons for decision (as summarized at paragraphs 19 and 20), so it would follow that there is no duty to give those applicants an opportunity to respond to such evidence.

[27] Here, the alleged contradictory evidence with respect to the location of their father's body was central to the officer's credibility determination. Therefore, the applicant should have been given an opportunity to respond to the officer's concern that the brother's interview contradicted the applicant.

[28] I also do not agree with the respondent's argument that it is so clear the applicant's claim will fail that I should decline to return it for reconsideration, even if fairness was breached. The officer's two paragraphs of reasons devoted one long paragraph to the contradictory evidence issue and there is no finding in the alternative. The officer may very well have viewed other credibility issues differently, such as the reasons offered for a lack of identification, if the applicant had been given an opportunity to respond to the alleged contradiction with his brother.

[29] The application for judicial review is therefore granted and the matter returned to a different officer for redetermination.

[30] The applicant proposed four serious questions of general importance for my consideration for certification:

1. In an application for permanent residence at a Canadian visa office abroad, does the visa office breach the duty of fairness owed the applicant by basing the decision in part on an interview with another, related applicant, but not disclosing the part of the other interview to the applicant which contradicts the applicant's evidence with an opportunity to respond?
2. Is there a breach in the duty of fairness owed an application for immigration at a visa post abroad where
 - a) the visa office interviews related applicants separately,
 - b) refuses the application of the applicant based on inconsistencies with the interview of the other related applicant, and
 - c) the visa office does not disclose to the applicant the inconsistencies with an opportunity to respond?
3. Does the visa office breach the duty of fairness by failing to notify a person who is applying for permanent residence at a visa post abroad as a member of the Convention refugee abroad class or a member of the humanitarian protected persons abroad designated

class that the visa office will consider statutory declarations of identity where there is a reasonable and objectively verifiable explanation related to the circumstances in the applicant's country of nationality or national residence for the applicant's inability to obtain an identity document?

4. Can a decision stand despite a breach of the duty of fairness solely because there is another basis for the decision than the conclusion reached in breach of the duty of fairness?

[31] The respondent did not wish to submit a proposed serious question of general importance for my consideration for certification but opposed the certification of the applicant's questions.

[32] I am not prepared to certify the proposed serious questions as they do not transcend the interests of the immediate parties nor do they contemplate issues of broad significance or general application (see *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, (1994) 176 NR 4 (FCA), [1994] FCJ No 1637, at paragraph 4). The level of procedural fairness for each case depends on the facts of the case.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is allowed and the matter is returned to a different officer for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions***Immigration and Refugee Protection Act, SC 2001, c 27***

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4253-12

STYLE OF CAUSE: ABDI ABDULLAHI AHMED
- and -
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: February 20, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: February 28, 2013

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