Federal Courts Reports
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IMM-4756-21

2022 FC 1424

Mustafa Abdi Ibrahim (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: IBRAHIM V. CANADA (CITIZENSHIP AND IMMIGRATION)

Federal Court, Zinn J.—By videoconference, October 17; Ottawa, October 19, 2022.

Citizenship and Immigration — Exclusion and Removal — Removal of Refugees — Application for judicial review challenging pre-removal risk assessment (PRRA) decision concluding that applicant failed to meet requirements of Immigration and Refugee Protection Act (Act), ss. 96, 97 — Applicant, Somali citizen, applied for refugee status — Declared inadmissible — Submitted PRRA application — Provided affidavits supporting alleged risks — Officer found, inter alia, affidavit from applicant's brother vague, not written by objective third party, translated by applicant — Respondent argued that officer's decision not based on credibility, but on insufficiency of evidence — Whether application should be allowed — Not sufficient for officer to refer to author of evidence in question, state that evidence having minimal probative value because author family member or friend — Officer did not give limited weight to evidence based solely on self-serving nature of evidence — Here, evidence examined for its weight, not its credibility — This is proper approach — Nevertheless, officer's statements that brother's affidavit self-translated by applicant, that no indication of counsel's (before whom affidavit sworn) proficiency in Somali language, very concerning — Officer implying either that inability to verify accuracy of translation meant it was difficult to assess reliability of information, or applicant unable to translate from Somali to English, or applicant had translated his brother's words favourably for his PRRA application — If implying latter, this amounting to suggesting that applicant lied to his counsel when interpreting or that he "coached" the witness — Either is a credibility concern — Officer implying that applicant lied when translating words of his brother for affidavit — Questioning credibility of applicant — This would require oral hearing — If evidence accepted, given weight, would go long way to supporting applicant is at risk in Somalia — This meeting Immigration and Refugee Protection Regulations, s. 167 requirements for hearing — Officer discounted weight to be given to evidence because of involvement of applicant — Matter moved from arena of weight of evidence to credibility of applicant, his brother — PRRA decision set aside — Application allowed.

This was an application for judicial review challenging a decision by a pre-removal risk assessment (PRRA) officer concluding that the applicant failed to meet the requirements of sections 96 and 97 of the *Immigration and Refugee Protection Act* (Act).

The applicant, a Somali citizen, was granted resident status in the United States. Because of his criminal history, his residency status was later terminated and he faced a removal order. The

applicant entered Canada and applied for refugee status. He was reported under the Act for serious criminality and declared inadmissible. The Minister's delegate issued a deportation order. In 2019, the applicant submitted a PRRA application. The applicant, a Samaroon clan member (majority clan), identified risk of persecution by Samaroon clan members for marrying his wife, a Gabooye clan member (minority clan), as the main risk in his PRRA application. He also provided several affidavits supporting the alleged risks. The officer assigned all little weight. The officer found, *inter alia*, the affidavit from the applicant's brother to be vague and lacking in details regarding the applicant's risks, that it was not written by an objective third party, and that it had been translated by the applicant and not an independent party. The applicant argued that the officer breached natural justice by failing to hold an oral hearing. The respondent argued that the officer's decision was not based on credibility, but rather on insufficiency of the evidence.

At issue was whether the application should be allowed.

Held, the application should be allowed.

While it is appropriate to consider self-interest when assessing the weight to be attributed to evidence, it is not sufficient for an officer to refer to the author of the evidence in question and state that the evidence has minimal probative value because the author is a family member or friend. The officer did not give limited weight to the evidence based solely on the self-serving nature of the evidence. The officer was suggesting that the affidavit lacked corroboration and therefore had insufficient probative value to establish risk of persecution. Here, the evidence was being examined for its weight and not its credibility. This is a proper approach. Nevertheless, the officer's statements that the brother's affidavit was "self-translated by the applicant and not an independent party", and that this affidavit was "sworn before the applicant's legal representative …, with no indication of counsel's proficiency in Somali language" were very concerning. These comments were not merely unfortunate. The officer was implying either (1) that the inability to verify the accuracy of the translation meant it was difficult to assess the reliability of the information, or (2) that the applicant was unable or unqualified to translate from Somali to English, or (3) that the applicant had translated his brother's words favourably for his PRRA application. If the officer was implying the latter, this amounts to suggesting that the applicant lied to his counsel when interpreting or that he "coached" the witness. Either is a credibility concern. The only sense that could be made of the officer's observation that the applicant "has a good command of the Somali language" was that he was implying that the applicant lied when translating the words of his brother for the affidavit. The officer, in diminishing the affidavit's weight based on the applicant translating and the lawyer not knowing Somali, was really questioning the credibility of the applicant. This would require an oral hearing because the brother's affidavit was crucial to the PRRA decision. If his evidence is accepted and given weight, it goes a long way to supporting that the applicant is at risk in Somalia. It meets the requirements of section 167 of the *Immigration and Refugee Protection Regulations* for a hearing. The brother's evidence was as to facts within his knowledge, observation, and experience. The officer here discounted the weight to be given to the evidence because, in part, of the involvement of the applicant. In so doing, the matter moved from the arena of weight of evidence to credibility of the applicant and his brother. The PRRA decision was set aside, and the application was to be reconsidered by a different officer.

STATUTES AND REGULATIONS CITED

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 96, 97.

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 167.

CASES CITED

DISTINGUISHED:

Ferguson v. Canada (Citizenship and Immigration), 2008 FC 1067, [2009] 1 F.C.R. D-2.

REFERRED TO:

Rahman v. Canada (Citizenship and Immigration), 2019 FC 941.

APPLICATION for judicial review challenging a pre-removal risk assessment decision of an officer concluding that the applicant failed to meet the requirements of sections 96 and 97 of the *Immigration and Refugee Protection Act*. Application allowed.

APPEARANCES

Raoul Boulakia for applicant.

James Todd for respondent.

SOLICITORS OF RECORD

Raoul Boulakia, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

ZINN J.:

[1] Mr. Ibrahim challenges a Pre-Removal Risk Assessment (PRRA) decision of an officer that concluded that he failed to meet the requirements of sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[2] I have concluded that the PRRA decision must be set aside. The officer denied the applicant procedural fairness in failing to hold a hearing, which in the circumstances here, was required.

[3] The applicant is a Somali citizen. In 1994, he was sponsored to the United States of America and was granted resident status. In 2003, he received a 5-year sentence of imprisonment for a criminal offence. In 2010, he received a 3-month sentence for violating his probationary conditions. Because of his criminal history, his residency status was terminated and he faced a removal order.

[4] On or about September 15, 2017, the applicant entered Canada and applied for refugee status. He was reported under the Act for serious criminality. Based on his criminal convictions, the applicant was inadmissible to Canada and the Minister's delegate issued a deportation order on November 23, 2018. As his risk had never been assessed, he was entitled to a PRRA application.

[5] On February 13, 2019, the applicant submitted his first PRRA application. In 2020, the first Application was rejected but the decision was set aside on consent. On October 23, 2020, the applicant provided updated documentation and submissions for his PRRA application.

[6] The applicant, a Samaroon clan member (majority clan), identified risk of persecution by Samaroon clan members for marrying his wife, a Gabooye clan member (minority clan), as the main risk in his PRRA application. He also relied on the secondary risk from various criminal factions and different clans as a returnee to

Somalia. He provided personal evidence and objective country documentation in support of his application. He also provided several affidavits supporting the risks alleged. The officer assigned all little weight.

[7] The applicant argues that the officer breached natural justice by failing to hold an oral hearing. The applicant submits that the officer made a veiled credibility finding and that a credibility finding requires a hearing. The respondent argues that the officer's decision was not based on credibility; rather, it was based on insufficiency of the evidence. The respondent cites, among others, my decision in *Ferguson v. Canada (Citizenship and Immigration)*, 2008 FC 1067, [2009] 1 F.C.R. D-2 (*Ferguson*).

[8] I find that the officer's treatment of the brother's affidavit to be the most problematic issue with the decision under review. It is sufficient to dispose of the application. The fact that I have not examined the other submissions of the applicant should not be taken as any indication that they are rejected; merely that they are unnecessary.

[9] The applicant states that his brother and sister, Ibrahim and Hodan, supported his marriage decision. Ibrahim attests in his affidavit that after he and their sister took part in a private celebration of the marriage, he was summoned by the chief of the Samaroon clan. He was warned that the applicant would be killed if he returned to Somalia, and that Ibrahim and Hodan no longer had the protection of the clan since they had taken part in the traditional marriage celebration. The chief also said that if the applicant and his wife ever had children, the children would be killed if they went to Somalia.

[10] Ibrahim attests that he owned a food stand which, shortly afterwards, was destroyed and defaced with discriminatory graffiti. Ibrahim and Hodan fled Hargeisa and went to live in Mogadishu. Ibrahim attests that in June 2017 (after the birth of the applicant's first child and while his spouse was pregnant with their second child) a group of five men came looking for him at his workplace in Mogadishu. He spoke with one of the men by phone, who told him they were Samaroon and had travelled from Hargeisa to kill him and Hodan, due to their support for the applicant's marriage and because they had learned that the applicant was having children with his "Midgan" wife. The applicant's brother and sister then fled from Somalia to Ethiopia.

[11] The applicant argues that the officer's decision regarding the affidavit of his brother amounts to a veiled credibility finding. The officer states:

> I find this affidavit from the applicant's brother Ibrahim to be vague and lacking in details with regards to the applicant's risks; he does not explain how these Samaroon men have found out that the applicant had a child, nor does it clarify as to how the members of the Samaroon clan would recognize the applicant or be aware of the applicant's whereabouts should he end up returning to Mogadishu. I note that Mogadishu, according to the general internet search, is over 1000 km away from their native Hargeisa, I note that the applicant left Somalia when he was a 10 years of age and is currently a 37 year old adult, therefore, making it reasonably harder to get readily recognized. It further detracts from the weight that this affidavit is not written by an objective third party disinterested in the outcome of this present application, that it was self-translated by the applicant and not an independent party, such as an accredited interpreter, and although this affidavit was sworn before the applicant's legal representative in Toronto, there is no indication of the applicant counsel's proficiency in Somali language. I do not find that this affidavit in and of itself or when taken

> in conjunction with other tendered evidence is sufficient to establish the applicant's stated risks in Mogadishu and for that reason I assign limited weight to it. [Emphasis added.]

[12] I agree with counsel's submission that while it is appropriate to consider self-interest when assessing the weight to be attributed to evidence, it is not sufficient for an officer to refer to the author of the evidence in question and state that the evidence has minimal probative value because the author is a family member or friend (see *Rahman v. Canada (Citizenship and Immigration)*, 2019 FC 941).

[13] The applicant's submission that the officer disregarded the brother's evidence because it was written by a person with an interest in the outcome of the case is not a correct characterization of the decision. The officer did not disregard the affidavit of the applicant's brother on the basis that the evidence comes from a person interested in the outcome of the case; rather, the officer gave limited weight to the brother's affidavit on the basis that it was "vague and lacking in details with regard to the applicant's risks." The officer did not give limited weight to the evidence based solely on the self-serving nature of the evidence. The officer is suggesting that the affidavit lacks corroboration and therefore has insufficient probative value to establish risk of persecution in Mogadishu. Here, the evidence is being examined for its weight and not its credibility. This is a proper approach.

[14] Nevertheless, I find the officer's statements that the brother's affidavit was "self-translated by the applicant and not an independent party", and that this affidavit was "sworn before the applicant's legal representative in Toronto, with no indication of counsel's proficiency in Somali language" to be very concerning. I am unable to agree with the submission of the respondent that these comments are merely unfortunate.

[15] By stating that the brother's affidavit being self-translated by the applicant detracts from the weight accorded this affidavit, the officer is implying one of three things. He is implying either (1) that the inability to verify the accuracy of the translation means it is difficult to assess the reliability of the information, or (2) that the applicant is unable or unqualified to translate from English to Somali, or (3) that the applicant has translated his brother's words favourably for his PRRA application. If the officer is implying the latter, this amounts to suggesting that the applicant lied to his counsel when interpreting or, as suggested by the respondent, that he "coached" the witness. Either is a credibility concern.

[16] The officer states that the applicant "has a good command of the Somali language." This suggests that the problem is not with the accuracy of the translation of Somali to English rather it is the fact that the applicant himself translated his brother's evidence.

[17] I believe that the only sense that can be made of the officer's observation is that he is implying that the applicant lied when translating the words of his brother for the affidavit. Moreover, the officer stating, "there is no indication of the applicant counsel's proficiency in Somali language" further supports that the officer has an issue with the credibility of the applicant. As the applicant submits, this supports the view "that the Applicant must have been deceiving his lawyer."

[18] I do not agree with the applicant that the officer is requiring that the lawyers who commission affidavits should always be proficient in the language of the witness. In my

view, the officer is expressing the view that the lawyer commissioning the affidavit of the applicant's brother could not verify the truthfulness of the statement because the lawyer does not speak Somali and was reliant on the applicant's translation. This implies that the applicant may have been lying when he was translating his brother's words or coaching him in what to say. This does not go to the corroboration of the evidence; it questions the credibility of the applicant. The officer, in diminishing the affidavit's weight based on the applicant translating and the lawyer not knowing Somali, is really questioning the credibility of the applicant. This would require an oral hearing because the brother's affidavit is crucial to the PRRA decision. If his evidence is accepted and given weight, it goes a long way to supporting that the applicant is at risk in Somalia. It meets the requirements of section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[19] I add that this case differs significantly from the facts in *Ferguson*. *Ferguson* was a review of a PRRA decision where the applicant alleged risk based on her sexual orientation. The only evidence that she was lesbian were statements made in written submissions by her counsel to that effect. The officer noted this fact and held that he or she has "not been provided with supporting evidence that establishes, on the balance of convenience, that the applicant is a homosexual."

[20] In *Ferguson*, the evidence given little weight was not first-hand personal knowledge. In contrast, the brother's evidence here is as to facts within his knowledge, observation, and experience. Unlike *Ferguson*, the officer here is not saying that even if he gives that evidence weight, it fails to satisfy the burden of proof. Rather, the officer here discounts the weight to be given to the evidence because, in part, of the involvement of the applicant. In so doing, the matter moves from the arena of weight of evidence to credibility of the applicant and his brother.

[21] No question was proposed for certification.

JUDGMENT in IMM-4756-21

THIS COURT'S JUDGMENT is that: the application is granted, the Pre-Removal Risk Assessment decision under review is set aside, the applicant's application is to be reconsidered by a different officer, and no question is certified.