Federal Court  Cour fédérale

Date: 20150724

Docket: IMM-5580-14

Citation: 2015 FC 906

Ottawa, Ontario, July 24, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

LIBAN MAHAD ABDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant claims that he is a Sufi Muslim from a minority clan in Somalia and that he would be murdered by a terrorist organization called Al-Shabaab if he stayed in Somalia. He allegedly fled to Kenya on August 15, 2013, and found his way to Canada on November 10, 2013. The Applicant asked for refugee protection shortly after he arrived in Canada.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected the Applicant's claim because he had not supplied enough evidence to prove he was from Somalia. Since there was no functioning administration in that country which could produce official identity cards, the Applicant had produced an identity witness, Mr. Farah, who claimed that he used to sell livestock to the Applicant's father in Somalia, but the RPD did not find Mr. Farah credible. His testimony was inconsistent with that of the Applicant on many details, including where Mr. Farah lived, what kind of animals he sold, and how many animals the Applicant's father would typically purchase. In addition, the RPD found that a letter from the Somali Immigrant Aid Organization, which purported to confirm the Applicant's identity, had a significant omission; the letter never mentioned that this organization allegedly found Mr. Farah for the Applicant. The RPD therefore rejected the Applicant's claim.

[3] The Applicant appealed the decision of the RPD to the Refugee Appeal Division [RAD] of the IRB, but his appeal was dismissed on June 25, 2014. The RAD confirmed that the Applicant was not entitled to protection under either section 96 or subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*]. The Applicant now seeks judicial review pursuant to subsection 72(1) of the *Act*, asking the Court to set aside the RAD's decision and order a different panel of the RAD to re-determine his appeal.

II. Issues

[4] The parties submit four issues for the Court's consideration:

1. Did the RAD err in its assessment of new evidence?

2. Did the RAD err in its determination respecting the appropriate standard of intervention?

3. Did the RAD err in assessing the credibility findings made by the RPD?

4. Did the RAD err by misinterpreting its jurisdiction to hold an oral hearing?

III. The RAD's Decision

[5] In its decision, the RAD first considered what the test for admitting new evidence should be under subsection 110(4) of the *Act*. Although that provision is similar to paragraph 113(a) of the *Act*, the RAD decided that, since the purpose of a RAD appeal was different from a pre-removal risk assessment [PRRA], the test for admitting new evidence should not be the same as that set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paragraph 13, 289 DLR (4th) 675 [*Raza*]. The RAD instead modified the *Raza* test and found that appellants only needed to show that any proposed evidence was: (1) "evidence that arose after the rejection of their claim [by the RPD] 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"; (2) credible; (3) relevant; and (4) material, in the sense that the evidence might affect the disposition of the appeal.

[6] Applying this test to the case before it, the RAD found that all of the Applicant's new evidence was inadmissible. The Applicant's affidavit offered nothing new since everything it said was already part of the RAD's record. The affidavit from a new identity witness, Mr. Mohamed, was new but he had been found by the Applicant. Since the Applicant was the "source" of this new witness and the Applicant was found by the RPD not to be credible, the

RAD determined that Mr. Mohamed's testimony also must not be credible. As for a new letter from the Somali Immigrant Aid Organization, the RAD could not see any reason why this information had not been submitted to the RPD in the first place. Without any admissible new evidence, the RAD therefore decided that the oral hearing requested by the Applicant was not permitted by subsection 110(6) of the *Act*.

[7] The RAD then noted that the Applicant was only appealing the RPD's findings of fact. Following *Iyamuremye v Canada (Citizenship and Immigration)*, 2014 FC 494 at paragraph 40 [*Iyamuremye*], the RAD decided to apply the reasonableness standard of review.

[8] The RAD pointed out that refugee claimants must supply acceptable documentation to establish their identities or else explain why they did not (citing *Act*, s 106; *Refugee Protection Division Rules*, SOR/2012-256, s 11). The Applicant did not supply any documentation to prove his identity, and the RAD determined that the RPD reasonably rejected the Applicant's excuses for that omission. That determination did not depend on the absence of government documentation, and the RAD found that it was reasonable for the RPD to expect some evidence to corroborate the Applicant's phone calls to Somalia and the transactions the Applicant had allegedly made there when he sold his house. The RAD further decided that it was reasonable for the RPD to find the Applicant and his first identity witness not credible due to the inconsistencies between their stories. The RAD therefore dismissed the Applicant's appeal, saying that the outcome reached by the RPD fell within a range of possible, acceptable outcomes that are defensible with respect to the facts and the law.

IV. Analysis

A. Did the RAD err in its assessment of new evidence?

[9] The parties dispute whether it was appropriate for the RAD to adapt the *Raza* test for admitting new evidence under subsection 110(4) of the *Act*. In *Raza*, the Federal Court of Appeal interpreted paragraph 113(a) of the *Act*, which is a similarly-worded provision that governs the introduction of new evidence in a PRRA. In that context, the Federal Court of Appeal decided that a claimant not only needed to satisfy the express statutory conditions for admitting new evidence, but the proposed material must also be relevant, credible, new, and "material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD."

[10] As mentioned above, the RAD in this case determined that subsection 110(4) was different enough that the *Raza* criteria did not strictly apply. It only directly incorporated the relevance and credibility criteria into its own test for admitting new evidence. The RAD folded the newness criterion into its evaluation of the express statutory conditions, and adopted a significantly more lenient materiality condition that would admit evidence so long as the following question can be answered affirmatively: "[i]s the new evidence capable of showing that the decision or reasons of the RPD are in error, or might the evidence affect the appropriate disposition of the appeal?"

[11] Since the RAD was interpreting its home statute when creating this test, this determination should be reviewed by this Court on the reasonableness standard (*Singh v Canada*

(Citizenship and Immigration), 2014 FC 1022 at paragraphs 39-42 [*Singh*]; *Iyamuremye* at paragraph 45; *Denbel v Canada (Citizenship and Immigration)*, 2015 FC 629 at paragraph 29 [*Denbel*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraph 39, [2011] 3 SCR 654). The same standard applies when reviewing how the RAD employs whichever test it has selected, as that would be a question of mixed fact and law (*Singh* at paragraph 42; *Denbel* at paragraphs 29 and 44; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 53, [2008] 1 SCR 190; *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at paragraph 35, 144 DLR (4th) 1).

[12] Consequently, intervention on this ground is not warranted unless I cannot understand why the RAD reached its conclusions or how the facts and applicable law support its decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraphs 15-16, [2011] 3 SCR 708). I can neither reweigh the evidence nor substitute my own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339).

[13] The jurisprudence of this Court is divided on the test for new evidence under subsection 110(4) of the *Act*. Some decisions have held that it is appropriate for the RAD to adopt the *Raza* criteria because subsection 110(4) of the *Act* is very similar to paragraph 113(a) (*Denbel* at paragraphs 40-43; *Iyamuremye* at paragraphs 45-46; *Ghannadi v Canada (Citizenship and Immigration)*, 2014 FC 879 at paragraph 17). Other decisions have held that it is unreasonable to strictly apply *Raza*, and that the *Raza* criteria would at least need to be modified to accommodate the different purposes of a PRRA and a RAD appeal (see e.g. *Singh* at

paragraphs 48-58; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paragraphs 55-58; *Ngandu v Canada (Citizenship and Immigration)*, 2015 FC 423 at paragraphs 14-22).

[14] There is no need, however, to choose between these two lines of authority in the present case. Even if the RAD reasonably relied upon *Raza* when creating its test, I am satisfied that it did not reasonably apply the test which it created for several reasons.

[15] First, the RAD was wrong when it said (at paragraph 39) that the Applicant's affidavit "offers nothing new, as that evidence is already in the RPD record." The Applicant's affidavit is almost exclusively about his friendship with Mr. Mohamed, his new identity witness, and it describes how he ran into him at a mosque on March 7, 2014. This event happened after the Applicant's claim had been rejected by the RPD, and nothing about his account or about Mr. Mohamed was already in the RPD record.

[16] Second, it was not reasonable for the RAD to reject the affidavit of Mr. Mohamed in the way it did. The RAD reasoned (at paragraph 39 of its decision) that because "the new witness comes from the same source (the Appellant) who was found not [to be] credible, the RAD assessed [Mr. Mohamed's affidavit] not to be credible and does not accept it." That was unreasonable. Just because the Applicant had encountered this new witness and had himself been considered not to be credible by the RPD was no reason for the RAD to blindly find Mr. Mohamed's affidavit not to be credible as well. This is an illogical and unjustifiable determination.

[17] The RAD adopted the credibility criterion from *Raza*, and implicitly asked itself the following question: "[i]s the evidence credible, considering its source and the circumstances in which it came into existence?" (*Raza* at paragraph 13). However, the RAD erred by stating that the "source" of Mr. Mohamed's affidavit was the Applicant. That is not accurate. Mr. Mohamed's personal experiences were the source of his own testimony, and he gave that testimony under oath. All the Applicant did was present that evidence, and a general finding that a refugee claimant lacks credibility does not impugn all evidence that might corroborate his story (*Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at paragraph 4, 384 NR 163).

[18] It was also an error for the RAD to rely so heavily on the fact that the RPD had found the Applicant was not credible. The admissibility of new evidence is a threshold determination which could potentially trigger an oral hearing pursuant to paragraph 110(6) of the *Act*, and the RPD's finding that the Applicant was not credible was plainly being challenged in the appeal. It was unreasonable for the RAD simply to presume that the very findings that were under appeal were error-free when deciding whether to admit new evidence that could contradict those findings.

[19] Accordingly, the RAD's decision is not reasonable and cannot be justified as an acceptable outcome defensible in respect of the facts and the law. The matter must be returned to the RAD for re-determination by another panel member. The Applicant is entitled to an appeal where the credibility of the Applicant's new identity witness can be properly assessed and examined.

[20] In view of this conclusion there is no need to address the other issues stated above.

V. Certified Question

[21] The Applicant proposed a question for certification at the conclusion of the hearing of this matter. That question pertains to whether a revised version of the test set out in *Raza* should be utilized by the RAD for purposes of subsection 110(4) of the *Act*. The Respondent opposes such certified question because this issue will soon be addressed in the appeal from *Singh*, and certifying a further question would be of little utility at this time.

[22] The proposed question is not dispositive of this matter, though, and I agree with the Respondent that no such question should be certified (see e.g. *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at paragraph 57; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at paragraph 9, [2014] 4 FCR 290; *Act*, s 74(d)).

VI. Conclusion

[23] In view of the foregoing reasons, the Applicant's application for judicial review is granted, the RAD's decision is set aside and the matter is returned to the RAD for a new determination.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned to the Refugee Appeal Division for re-determination by a different panel member; and there is no question of general importance for certification.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5580-14
STYLE OF CAUSE:	LIBAN MAHAD ABDI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 18, 2015
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JULY 24, 2015

APPEARANCES:

Eve Sehatzadeh	FOR THE APPLICANT
Ada Mok	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Eve Sehatzadeh Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT