Federal Court  Cour fédérale

Date: 20141212

Docket: IMM-5723-13

Citation: 2014 FC 1198

Ottawa, Ontario, December 12, 2014

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

YUSUF AXMED KULMIYE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] The Applicant's request for refugee protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*] was refused by the Refugee Protection Division of the Immigration and Refugee Board of Canada [the Board]. The Applicant now applies for judicial review pursuant to section 72(1) of the *Act*, requesting that this Court set

aside the Board's decision and return the matter to a different member of the Board for re-determination.

[2] The Applicant is now a 24 year old man from Somalia and, according to his personal information form, he lived in Mogadishu for most of his life. The Applicant alleges that the majority Hawiye clan persecuted him for being a member of the minority Ashraf clan and that he has been harassed and discriminated against ever since he was a child. The Applicant claims that both his father and sister were victims of clan-based violence; his father died in 2000 after being beaten badly by Hawiye extortionists and, in April 2003, his sister was just 16 years old when Hawiye militia members raped and murdered her after pillaging their home. The Applicant also says that when his mother tried to intervene during this 2003 attack at their home, the Hawiye militia members beat her with their rifles.

[3] The Applicant further alleges that he was being targeted by a militant group called Al-Shabaab. When he was in grade 11, the Applicant would occasionally get calls from Al-Shabaab operatives asking if he worked for the transitional government, but he always answered that he was simply a student. In 2009, the Applicant says his mother told him that members of the Al-Shabaab militia came to his house and after this incident she sent him to hide at his aunt's house. Al-Shabaab members came to his house a second time in mid-December 2009, and again he was not home; this time, however, they told his mother that they would kill him if he did not contact them. Shortly thereafter, the Applicant's mother hired a smuggler to take him out of the country.

[4] In early 2010, the Applicant fled Somalia to the United States where he claimed asylum. The Applicant was incarcerated on an immigration hold in the United States and his claim for asylum in the United States was rejected in October, 2010. Following his release from detention under supervision in the United States in 2011, the Applicant came to Canada on March 29, 2012, seeking protection here.

II. Decision under Review

[5] In a decision dated July 31, 2013, the Board rejected the Applicant's claim because it concluded that he was neither a Convention refugee under section 96 of the *Act* nor a person in need of protection under section 97(1).

[6] The Board never questioned the Applicant's story, but nonetheless found that his fear of persecution had no objective basis. The Board determined that stability and the potential for a peaceful existence had returned to some parts of Somalia, especially since Al-Shabaab had lost every major population centre it once controlled, including Mogadishu, from which Al-Shabaab withdrew for tactical reasons in August, 2011.

[7] The Board found that Al-Shabaab did not often use force to recruit new members and instead recruited boys between the ages of 13 and 18 by offering them money and other inducements. Since Al-Shabaab had only made two visits to the Applicant's house, the Board did not think Al-Shabaab was trying very hard to find the Applicant. Consequently, the Board concluded that the death threat was probably just to ensure that the Applicant made himself available to meet with the Al-Shabaab, and the Board did not believe that Al-Shabaab would still

be interested in the Applicant several years after their recruitment attempts. More importantly, the Board found that Al-Shabaab no longer had any visible, oppressive presence in Mogadishu and returned only to commit terrorist attacks. In the Board's view, Al-Shabaab would be in no position to track down the Applicant should he return to Somalia.

[8] As for the Applicant's other allegations, the Board was not satisfied that the incidents he experienced over the years were motivated by clan affiliation. The Board determined that the clan warfare was primarily driven by disputes over territory and resources, and it ended in 2006 after Islamic groups defeated the warlords. The Applicant and his family were, the Board stated, the victims of ordinary crimes, and the Board was not convinced that the perpetrators were driven by anything but greed. Consequently, the Board decided that there was no serious possibility that the Applicant would be harmed or persecuted because of his clan affiliation.

[9] Finally, the Board found that the Applicant's past experiences were not compelling enough reasons to grant him protection under section 108(4) of the *Act*. The Board determined that there was insufficient credible evidence to show that the Applicant had suffered any lasting psychological effects, and the government was not responsible for the Applicant's terrible experiences. In the words of the Board, the "alleged persecutors are criminals". Even Canada has criminals who hurt the innocent, the Board noted, and it thus decided that the Applicant's experiences were not exceptional enough to be compelling reasons to grant him protection.

III. Issues

[10] The Applicant submits two issues for the Court's consideration:

1. Did the Board err in its finding as to the objective well-foundedness of the Applicant's fear by ignoring relevant documentary evidence, making findings of fact based on speculation or irrelevant considerations?
2. Did the Board err by improperly applying subsection 108(4) of the *Act*?

[11] The Respondent contends that the only issues are:

1. What is the appropriate standard of review?
2. Was the Board's decision reasonable?

IV. The Parties' Arguments

A. *The Applicant's Arguments*

[12] The Applicant asserts that some of his arguments raise issues of law, which attract the correctness standard of review (*Mugadza v Canada (Citizenship and Immigration)*, 2008 FC 122 at para 10). For everything else, the Applicant acknowledges that reasonableness is the standard of review (*Nzayisenga v Canada (Citizenship and Immigration)*, 2012 FC 1103 at para 24 [*Nzayisenga*]; *Sugiarto v Canada (Citizenship and Immigration)*, 2010 FC 1326 at para 10 [*Sugiarto*]).

[13] The Applicant states that the Board failed to have proper regard to all of the country documentation available to it and also did not properly assess the Applicant's claim on a forward-looking basis.

[14] The Applicant criticizes the Board for speculating about the reasons why Al-Shabaab was threatening to kill him (*Canada (Minister of Employment and Immigration) v Satiacum* (1989), 99 NR 171 at paras 34-35 (CA)). According to the Applicant, the country documentation clearly shows that Al-Shabaab is a brutal and violent organization and there is no reason to assume that its threats were empty. Furthermore, the Applicant says other documents before the Board showed that Al-Shabaab had not left Mogadishu completely and was still running an intense recruitment campaign targeting both adults and children using violence and threats. The Applicant asks the Court to infer that the Board overlooked this evidence since it squarely contradicts its findings (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at para 17, 157 FTR 35 [*Cepeda-Gutierrez*]). Even if more recent documentary evidence as to the conditions in Somalia does not paint as grave a picture as in the past, the Applicant argues that this does not cure the Board's failure to consider this evidence at all.

[15] In addition, the Applicant argues that the Board erred by finding that Al-Shabaab no longer had a presence in Mogadishu, since the documentary evidence confirms that they continue to commit terrorist attacks in that city and are still fighting the government-allied forces for power. The Applicant contends that more evidence was needed to find a durable or effective change in the threat posed by Al-Shabaab (*Khan v Canada (Minister of Citizenship and*

Immigration), 2001 FCT 1035 at para 10). Due to this error, the Applicant says that the Board never even considered his fear of Al-Shabaab as it related to his religious beliefs as a Sufi Muslim or his fear based on his presence in the West for the last few years. The Applicant states that it was unreasonable for the Board to deny his claim in light of the evidence that he had been specifically targeted by Al-Shabaab, especially since the Applicant had stated that "I will be harmed or killed by [Al-Shabaab] as I am not following their ideology … in [Al-Shabaab] mentality I came to the lands of infidels and I am unclean and dirty and don't deserve to be alive". The Applicant states that the Board failed to consider the evidence of religious persecution as it relates to the Applicant.

[16] As for his clan affiliation, the Applicant submits that the Board's finding that clan-based problems ended in 2006 was unjustifiable. The Applicant points out that a 2012 report from the United Kingdom's Border Services Agency expressly stated that the "UNHCR considers the Ashraf and Bravanese to be at risk of persecution on the ground of their ethnicity/race as they lack the military capabilities to defend themselves".

[17] Lastly, the Applicant argued that the Board misapplied section 108(4) of the *Act* by requiring the Applicant to have lasting psychological damage. No such requirement exists, the Applicant submits, and all that was required was atrocious persecution in the past (*Jiminez v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 87 (QL) at paras 31-34, 162 FTR 177).

B. *The Respondent's Arguments*

[18] The Respondent asserts that the standard of review for every issue is reasonableness, which precludes the microscopic approach advanced by the Applicant. Even if a few of the Board's findings are speculative, the Respondent argues that is not enough to make the decision under review unreasonable, since the finding that the Applicant's claim lacked an objective basis can be supported by the evidence. According to the Respondent, the Board adequately assessed the country condition documents based on the risks that the Applicant identified and simply preferred more recent documentation to that which he now cites. The Respondent contends that it is not the Court's role to re-weigh that evidence and that the Applicant has failed to demonstrate how the general country conditions would affect him personally.

[19] As for the claim that the Board ignored a nexus to religion, the Respondent argues that a fear based on religion was never squarely put to the Board. The Applicant put forward no substantive evidence of such a fear, the Respondent says, and the Board was under no duty to comment on it (*Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3, [2012] 3 SCR 405).

[20] Finally, the Respondent contends that protection under section 108(4) is exceptional (*Canada (Minister of Employment and Immigration) v Obstoj*, 93 DLR (4th) 144 at 157, [1992] 2 FCR 739 (CA); *Rasanayagam v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1080 (QL) at paras 6-7 (TD)). Such protection can only be extended if the Applicant established he was a victim of atrocious persecution, and the Board reasonably characterized the

events that happened to his family as criminal actions. Furthermore, the Board did not make lasting psychological effects a pre-condition; it simply observed that it was a relevant factor and that the Applicant had none. The Respondent says that was entirely reasonable (*Oprysk v Canada (Minister of Citizenship and Immigration)*, 2008 FC 326 at para 30).

V. Analysis

A. *What is the appropriate standard of review?*

[21] I agree with the Respondent that reasonableness is the standard of review for every issue raised by the Applicant (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [*Dunsmuir*]; *Nzayisenga* at para 24; *Sugiarto* at para 10). The Board's decision should not be disturbed so long as its "reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708).

B. *Was the Board's decision reasonable?*

[22] The Board's finding that Al-Shabaab had retreated from Mogadishu was supported by the evidence. Although the Applicant emphasized that Al-Shabaab still attacks targets in Mogadishu, this was something the Board recognized when it said that Al-Shabaab returns "only for terrorist type attacks before retreating again". That does not mean that Al-Shabaab would assassinate someone like the Applicant whom it failed to recruit half a decade ago. The Board's conclusion

that Al-Shabaab "does not have a visible, oppressive presence in Mogadishu any longer" was reasonable.

[23] The same cannot be said, however, for the Board's conclusion that it was unlikely that Al-Shabaab would still want to recruit the Applicant. In making its findings, the Board observed that the Applicant never knew why Al-Shabaab were looking for him, and speculated that: "[i]t could be that they did not want to harm him at all but rather wanted to offer him some of the inducements that the country documents state are routinely used to entice youth to join their ranks". The death threat, the Board stated, might not have been genuine and "could just as likely have been made to ensure that the claimant made himself available to meet with them in order for them to offer their inducements for membership".

[24] I agree with the Applicant that the Board's conjectures in this regard were not reasonable and ignored both the Applicant's evidence and the documentary evidence (*Satiacum* at para 35). In his personal information form narrative, the Applicant stated that, two days after Al-Shabaab members came to his house a second time, young people from his neighbourhood who refused to join Al-Shabaab "got killed in [sic] the spot". At the hearing before the Board, the Applicant also testified that "for the young guys that they [Al-Shabaab] ever approached, any of my friends, whoever said 'no' was killed". The Board never rejected this evidence nor questioned the Applicant's credibility, even though such evidence contradicts its speculation about why Al-Shabaab wanted to meet with the Applicant.

[25] Furthermore, the Board's finding that violence is not a preferred method of recruitment appears to have been based on a Response to Information Request about Al-Shabaab, SOM103871.E, but that document is not consistent with the Board's finding in this regard. It says that, "[n]umerous sources report that Al-Shabaab uses violence and the threat of violence to recruit children and youth […] and punishes or threatens those who resist, as well as their families". This document also confirms that adults are also forcibly recruited and, although it refers to incentives like money being used as well, there is no indication that offering inducements is a preferred method of recruitment.

[26] In addition, the Board unreasonably dismissed the significance of the death threat to the Applicant by asserting that it might not be genuine. In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724, 103 DLR (4th) 1 [*Ward*], the Supreme Court observed that: "it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness". For a similar reason here, the Applicant should not be required to give his alleged persecutors the chance to murder him just to prove that their death threat was genuine.

[27] The Applicant also argued that the Board overlooked material evidence. The Board found that minority clans do not face any special challenges any longer. Although some sources suggest weak minority clans such as the Ashraf were at risk of abuse in conflict situations, and other sources said that all groups were endangered, the Board found that the situation changed in 2006 when Islamic groups defeated a combined force of clan warlords. The Board found that was relevant since the Applicant's subjective fear was based on clan warfare, and that "the

current conflict is, ostensibly at least, a war between groups with different interpretations of Islam". As for the crimes the Applicant alleged he and his family had been subjected to, the Board stated these all centered around money and it was not convinced that his status as a member of a minority clan was the reason for them.

[28] I agree with the Applicant that the Board erred in its analysis of material evidence. Although the Board is presumed to have considered all the evidence (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (QL) at para 1 (CA)), which includes evidence as to country conditions (see: *Ponniah v Canada (Citizenship and Immigration)*, 2014 FC 190 at para 17 (available on CanLII)), this presumption can be rebutted if the Board does not address important evidence that directly contradicts its findings (*Hinzman v Canada (Citizenship and Immigration)*, 2010 FCA 177 at para 38, [2012] 1 FCR 257, citing *Cepeda-Gutierrez* at para 17). Furthermore, while this Court is sometimes reluctant to infer that country condition documentation was overlooked for various practical reasons (see: e.g., *Bustos v Canada (Citizenship and Immigration)*, 2014 FC 114 at paras 35-39, 24 Imm LR (4th) 81), I am prepared to draw that inference in this case for the following reasons.

[29] Although the Board reasonably found that the nature of the military conflict in Somalia changed in 2006 based on a 2009 document, it is unclear why this led the Board to discount the evidence from the Landinfo report that "all groups or clans who are outnumbered and lacking military strength in the area where they live can be categorised as minorities and may be subject to abuse in a conflict situation" (National Documentation Package (3 May 2013), item 13.3: Norway, Landinfo: Country of Origin Information Centre, "Somalia: Vulnerability, minority

groups, weak clans and individuals at risk" (21 July 2011)). This report was a 2011 document reporting evidence of the situation in 2009, which was well after the military defeat of the warlords.

[30] Moreover, there was evidence in the country documentation which could support the Applicant's claim, none of which was mentioned by the Board. The Ashraf clan, of which the Applicant is a member, are included under the umbrella term "Benadiri", and in its "Somalia 2012 Human Rights Report" (19 April 2013), the United States Department of State observed the following:

> More than 85 percent of the population shared a common ethnic heritage, religion, and nomad-influenced culture. In most areas members of groups other than the predominant clan were excluded from effective participation in governing institutions and were subject to discrimination in employment, judicial proceedings, and access to public services.
>
> Minority group clans included the Bantu (the largest minority group), Benadiri, Rer Hamar, Brawanese, Swahili, Tumal, Yibir, Yaxar, Madhiban, Hawrarsame, Muse Dheryo, Faqayaqub, and Gabooye. Intermarriage between minority groups and mainstream clans was restricted by custom. Minority groups, often lacking armed militias, continued to be disproportionately subject to killings, torture, rape, kidnapping for ransom, and looting of land and property with impunity by faction militias and majority clan members. Many minority communities continued to live in deep poverty and suffer from numerous forms of discrimination and exclusion.

[31] Like the United States Department of State report, the United Kingdom Border Agency reported the following in its operational guidance note on Somalia dated October 2012:

> **3.9.8** Minority Rights Group research has shown that "minority communities in Somalia fall outside the traditional clan structure of the majority and also therefore the protection afforded by such systems. Because of social segregation, economic deprivation and

> political manipulation, minorities are more vulnerable to rape, attack, abduction, property seizure and the consequences of drought". The same source reports that "Minority groups including the Bantu, Benadiri and Christian communities are attacked for practising their religious beliefs".
>
> **3.9.9** Furthermore, UNHCR Somalia explained that "today there is no guarantee of clan protection in Somalia, in particular members of minority clans and ethnic minority groups are vulnerable …
>
> …
>
> **3.9.11** … UNHCR considers the Ashraf and Bravanese to be at risk of persecution on the ground of their ethnicity/race as they lack the military capabilities to defend themselves and do generally not benefit from the protection of war-lords and militias of the large clans. [Footnotes omitted]

[32] The Board's failure to consider this aspect of the Applicant's claim casts doubt on the Board's finding that the people who attacked the Applicant's family did so only for money and had only criminal motives, since the Board never considered the evidence about the systemic factors that make a minority group such as that of the Applicant easy to target.

[33] Lastly, contrary to the Respondent's submissions that there was "scant" evidence before the Board to assess the degree of risk faced by the Applicant by reason of his religion, it was not reasonable for the Board to ignore this potential risk altogether. In my view, the Board in many aspects of its decision failed to have proper or reasonable regard to the relationship between the Applicant's status as a member of the Ashraf clan and as a Sufi Muslim vis-à-vis the Hawiye and Al-Shabaab militia members.

[34] In his personal information form, the Applicant only said that he feared persecution for "membership in a particular social group" and "political opinion". Although the Respondent notes that the Applicant did not check off the box for "religion" in such form, that omission is not fatal to his religious based fear. As the Supreme Court of Canada stated in *Ward* at 745, "it is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide whether the Convention definition is met".

[35] I agree with the Applicant that the prospect of a religious nexus to his claim was sufficiently raised before the Board. The Board member asked the Applicant at the hearing why Al-Shabaab would target him, and the Applicant answered that it was because he was Sufi and Al-Shabaab detests Sufism. Also, when making his arguments at the end of the hearing before the Board, the Applicant's counsel at the time expressly identified religion as a ground of persecution. The Board never squarely acknowledged or adequately addressed this aspect of the Applicant's claim. Accordingly, the Board's failure to address this aspect of the Applicant's claim was not reasonable.

[36] In view of the foregoing reasons, it is unnecessary to address the parties' submissions and arguments with respect to section 108(4) of the *Act*.

VI. Conclusion

[37] In the end, I find that the Board's decision was not reasonable and the application for judicial review is hereby allowed. Neither party suggested a question for certification; so, no such question is certified.

[38] The Applicant requested costs in his memorandum, but section 22 of the *Immigration Rules* provides that costs should not be awarded unless there are "special reasons" for so doing (see *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at paras 6-7, 423 NR 228). There are no such reasons in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a different panel of the Board for re-determination. No serious question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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