IMM-2124-96

BETWEEN:

SAFI MOHAMUD DIRSHE

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

CULLEN J.:

This is an application for judicial review of the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board [hereinafter, the "Tribunal"], dated May 31, 1996, that the applicant is not a Convention refugee.

The applicant requests an Order that the Tribunal's decision be set aside, and that the applicant be granted a new hearing with such direction as the Court sees fit.

THE FACTS

The applicant is a thirty-five your old woman from Somalia, a member of the Hawiye tribe and the Habr Gedir clan. She is currently married (her second marriage), and resides with her husband in Toronto, he having been determined to be a Convention refugee in 1992.

The applicant arrived in Canada in 1991, and claimed Convention refugee status. She was determined not to be a Convention refugee. The Federal Court of Appeal set aside that

decision, and the matter was referred back to the Tribunal for a re-hearing. The applicant based her claim for Convention refugee status on the basis of her race, political opinion, and membership in a particular social group, the Hawiye tribe of the Habr Gedir clan. Due to changed country conditions, the Tribunal determined that the applicant was not a Convention refugee. It is from the negative decision of this re-hearing that the applicant seeks judicial review.

The applicant testified that her clan was the subject of persecution by government troops in 1989. The applicant and her family, as well as other Hawiyes living in Galcayo were attacked by the Somali army. Her four year old son, and later her father, were killed by the Somalia army. The applicant fled to various areas of refuge within Somalia before making her way to Canada. The Tribunal accepted the applicant's testimony with regard to her experiences in Somalia as credible and trustworthy. The Tribunal accepted the documentary evidence that, during the final days of the regime of the ousted Siad Barre, the Hawiyes were at serious risk by reason of their clan, and were victims of persecutory acts.

However, the Tribunal found that the applicant was not a Convention refugee because the current country conditions in Somalia were such that the applicant no longer faced a reasonable risk of persecution there. She no longer faced a reasonable risk of persecution there because she had an internal flight alternative [hereinafter, "IFA"] amongst her clanspeople in areas such as Hobio, or in south Mogadishu. The Tribunal found that, objectively, it would be reasonable for the applicant to seek refuge in those places, because she had previously lived in both of those places while trying to escape the attacks of the Darods.

Because of the IFA among the applicant's clanspeople, the Habr Gedir, the Tribunal rejected the applicant's fear of rape in Somalia should she returned there. The Tribunal found that, although the Habr Gedir, as well as other clans, have indulged in the rape of women of other clans, there is no evidence of rape being a problem within the Habr Gedir membership itself. The Tribunal noted that documentary evidence states that "the rape of a woman is considered to be an attack on the manhood of both her husband and all the men of her clan." On this basis, the Tribunal concluded that there was not a serious possibility of the claimant being raped, if she were returned and lived among her Habr Gedir subclan.

The Tribunal further found that the applicant, as a woman returning alone to Somalia,

would not likely be at risk because there was documentary evidence that the situation of women has markedly improved in Somalia.

The applicant deposes that although sections of southern Somalia currently are ruled by the Habr Gedir sub-clan, this sub-clan is split into two warring factions. Documentary evidence before the Tribunal supported this assertion. The applicant is opposed to the leader of one of the sub-clans, General Mohamed Farah Aideed, and has spoken out against him while in Canada. The applicant believes that she would be persecuted by General Aideed's militia if she were returned to a territory that he controls. She thus has no IFA in the areas identified as such by the Tribunal.

The applicant further deposes that she cannot safely travel within Somalia, as armed gangs and other clansmen attack women who try to travel through the country.

THE ISSUES

The main issue in this case is whether or not the Tribunal erred in determining that the applicant has an IFA in Somalia.

A secondary issue is whether the Tribunal's decision is supported by the evidence before it. Was adequate consideration given to evidence contradictory to its conclusions?

DISCUSSION

"Internal Flight Alternative"

It is by now trite law in the Federal Court of Canada that, in order for an IFA to exist, the safe area must be one in which there is no genuine risk of serious harm, and it must not be unreasonable, in regard to the particular circumstances of the case, for the individual to go there.[1] In addition to the quality of protection available to the individual in the safe area, criteria to be taken into account in assessing whether an IFA exists include the practical possibility for the individual to get to the safe area; the ability of the individual to get to that safe area legally;

[1] *Rasaratnum* v. *Minister of Employment and Immigration* (5 December, 1991) A-232-91 (F.C.A.) [unreported].

and the stability of the safe place.[2]

In other words, in order for a viable IFA to exist, one is not required to stay just "one step ahead of the bullets."

Did the Tribunal apply the correct test in determining that the applicant had an IFA in south Mogadishu and Hobio? I believe that the Tribunal's determinations on the quality of safety within the IFA, the practical possibility of reaching the IFA, and the reasonableness of the IFA in the particular circumstances of the claimant are at issue in the instant case.

1. Fear of persecution within the IFA: the quality of safety: The Tribunal's decision is based on the supposition that in a Habr Gedir region controlled by General Aideed, there is no genuine risk of harm to the applicant.

The applicant presented documentary evidence of the splitting of the Habr Gedir clan into various factions, and the resultant in-fighting. The applicant deposes that her own sub-clan is targeted by General Aideed's more powerful forces. The Tribunal's own expert report prepared by Professor Cassanelli speaks to the vulnerability of sub-clan members of the Habr Gedir due to internal conflict. The Tribunal had considered the applicant's opposition to General Aideed, but was of the opinion that the applicant had "not shown any genuine political, religious or moral convictions, or reasons of conscience to support her alleged objection."

In support of its conclusion that, as a woman with no family support in Somalia, the applicant would not be at risk, the Tribunal cited documentary evidence about the improved condition of women in Somalia, as well as traditional cultural values discouraging rape.

The Tribunal acknowledged documentary evidence of rape within clans and in refugee camps particularly by bandits and robbers. The Tribunal gave this evidence no weight *vis-a-vis* the applicant, because it also found that there is no documentary evidence that rape is a marked phenomenon within the Habr Gedir clan membership itself.

The applicant cited documentary evidence that directly contradicts the evidence cited by

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[2] See, for example, *Savaratham*.

the Tribunal, particularly on the topics of rape, violence against women, the erosion of women's rights, and the necessity of strong family support for adequate protection. The Tribunal made no reference whatsoever to contradictory evidence on the status of women in Somalia. The contradictory evidence was before the Tribunal, in the very same report that it cited in support of its conclusion. Although questions of weight of evidence are within the jurisdiction of the Tribunal, the Tribunal must at least mention why contradictory documentary evidence going to the core of the claim is given little weight or rejected.

The documentary evidence cited by the Tribunal in support of its finding that the applicant has a viable IFA does not really support that position. For example, the Tribunal quotes from *Human Rights Watch Africa*:

> ... The human rights situation of the ordinary Somalia depends largely on his or her place within this patchwork, largely of clan and subclan, into which much of Somalia society is divided. A level of authority can be found in each of these clan-defined fragments of the body politic with varying capabilities to protect the rights of its members - or to abuse the rights of others.
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> ... [These authorities] may, at the same time, mobilize forces dedicated to exclude others from the exercise of their fundamental rights or to be the instrument of the deprivation of such rights.[3]

It is hard to believe that the Tribunal found that there was no objective basis to the applicant's fear of persecution, on the strength of this kind of evidence.

2 Physical possibility to get to the IFA: The applicant cites documentary evidence that travel within Somalia presents its own perils, because, for many Somalis, the only way to travel is by walking, thus leaving the fleeing people open to attack. This means walking across potentially dangerous -- especially in view of the risk of rape by other clansmen and violent attack -- territory.

The Tribunal had found that the applicant's fear of robbers and gangs does not amount to a fear of persecution within the meaning of the definition of a Convention refugee.

The Tribunal erred in law in its assessment of the applicant's fear of gangs and roving militia in relation to the IFA. In order for an IFA to be viable, it must be physically possible for the applicant to get there. This involves an assessment of how the applicant is to get there. If it

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[3] "Somalia Faces the Future," *Human Rights Watch Africa*, April, 1995.

is dangerous for the applicant to get to the safe area, it cannot be said that the IFA is a practical possibility. There is no evidence that the Tribunal turned its mind to the practical possibility of the applicant actually getting to her IFA.

It is essential that, if there is an IFA within a country, the person requiring it must be able to get to it safely. The Tribunal heard evidence that walking is the usual method of getting about in Somalia. The applicant would, therefore, most likely have to get to the IFA on foot. The Tribunal also heard and accepted evidence of roaming gangs of robbers and armed militia, as well as the risk of rape to women by men outside of their own clan.

The Tribunal did not take into account the risk of persecution on Convention grounds that would be faced by the applicant in trying to get to her IFA within Somalia. The Tribunal thus discounted the applicant's subjective fear. Both of these findings are errors in law.

When the Tribunal determined that the applicant would not be at risk as a woman returning to Somalia with no family support or protection, it again neglected to apply its analysis to the practical possibility of her actually getting to the IFA. This is a further error in law. The Tribunal considered the safety of women only within the IFA area controlled by the Habr Gedir. However, in the circumstances of this case, it was necessary to consider the applicant's fear within the context of her having to get to the IFA. Presumably, the applicant would not be parachuted into the safe area. The evidence before the Tribunal, and which was mentioned by the Tribunal in its reasons, was that women do run a risk of rape from men of different clans. There was, therefore, evidence of persecution of women on Convention grounds, and this aspect of the Tribunal's decision was made without regard to that evidence.

3. Is the IFA reasonable for the applicant? The test is whether the applicant can "reasonably and without undue hardship find ... a secure substitute home" in a proposed IFA region.[4] Further, as I have stated in *Hussain* v. *Minister of Employment and Immigration* (4 May, 1994) A-1312-92 (Fed. T.D.) [unreported] at page 7, an IFA to a particular region is unreasonable where there is an "absence of structures and organization in the ... area from which the claimant could seek protection."

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[4] *Ahmed* v. *Minister of Employment and Immigration* (14 July, 1993) A-89-92 (F.C.A.) [unreported] at 4.

In the instant case, the Tribunal has treated General Aideed's militia as providing a reliable IFA.

In concluding that it would not be unreasonable for the applicant to avail herself of the IFA, the Tribunal does not seem to have given consideration to the applicant's evidence about the killing of her father and infant son. The applicant's closest family connections in Somalia have been tragically severed. There is evidence of continued hostilities between clans, and even infighting within the clans themselves. Into such an environment the applicant would be thrust, alone, with no family support or protection. The Tribunal's conclusion is not supported by the evidence before it. This is an error in law.

4. Changed country conditions: The Tribunal determined that the changes in country conditions that have taken place in Somalia have been sufficient to affect the well-foundedness of the applicant's fear of persecution should she be returned there.

The Federal Court of Appeal has spoken to changes in country conditions in *Yusuf, Sofia Mohamed* v. *Minister of Employment and Immigration* (9 January, 1995) A-130-92 [unreported] thus:

> ... A change in the political situation in a claimant's country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. That is an issue of factual determination and there is no separate legal "test" by which any alleged change in circumstances must be measured. The use of words such as "meaningful" "effective" or "durable" is only helpful if one keeps clearly in mind that the only question, and therefor the only test, is that derived from the definition of Convention refugee in section 2 of the *Act*: does the claimant now have a well-founded fear of persecution?

The Courts have consistently held that the changes in country conditions must be assessed according to their impact on the claimant's situation.[5]

A finding by the Tribunal that there have been changes in country conditions does not finally determine a claim to Convention refugee status. This is explained in subsection 2(3) of the *Act*, which reads:

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[5] *Rahman, Faizur* v. *Minister of Employment and Immigration* (14 May 1993) A-1224-91 (F.C.A.) per Marceau, Desjardins, and Letourneau [unreported].

> (3) A person does not cease to be a Convention refugee by virtue of paragraph 2(e) if the person establishes that there are compelling reasons arising out of any previous persecution for refusing to avail himself of the protection of the country that the person left, or outside of which the person remained, by reason of fear of persecution.

This subsection is substantially similar to paragraph 136 of the United Nations *Handbook on Procedure and Criteria for Determining Refugee Status* (1979) Geneva: Office of the United Nations High Commissioner for Refugees:

> [The clause] deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin ... It is frequently recognized that a person who, or whose family, has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experience, in the mind of the refugee.

If a person, who, because of a change in country conditions, may no longer have a well-founded fear of persecution for a Convention reason, that person may nonetheless be a Convention refugee and refuse to avail herself of the protection of her country if there are compelling reasons for her not to do so. This is the effect of subsection 2(3) of the Convention refugee definition in the *Immigration Act*. If there are such compelling reasons, then, pursuant to subsection 2(3), the cessation clause of the definition, paragraph (2)(e), will not be operative and the change of country conditions will not thereby defeat the person's claim for Convention refugee status.

However, the sparse case law on subsection 2(3) indicates that it is to be applied only in exceptional circumstances. The key decision on point is that of Hugessen, J. in *Obstoj* v. *Minister of Employment and Immigration* (12 May 1992) A-1109091 (Fed. C.A.) [unreported]. Hugessen, J. stated that subsection 2(3) applies where a person has suffered "such appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution." However, Hugesson, J. further commented that, "The exceptional circumstances envisaged by subsection 2(3) must surely apply to only a tiny minority of present day claimants." Neither the Tribunal in its decision nor the applicant in her submissions before this Court have dealt with subsection 2(3) of the *Act*.

CONCLUSION

The Tribunal erred in law regarding several key elements of the IFA. The erroneous findings were on matters at the heart of the applicant's claim to Convention refugee status. This constitutes a serious error in law which has resulted in a decision that is patently unreasonable, warranting intervention by this Court. The Tribunal's decision is set aside, and the matter referred to a differently constituted Tribunal for re-determination on the issue of the IFA, taking into account the reasoning set out in this decision.

At the end of this hearing, counsel for the applicant proposed the following question for certification:

> Whether a refugee claimant is required to seek the protection of a militia which has not yet established any of the civic institutions of government, is engaged in internecine warfare, and routinely commits crimes against humanity,

This is not a question of general application but a question of fact, to be decided in each instance as it arises. Therefore, this question will not be certified.

OTTAWA, ONTARIO B. Cullen

July 2, 1997. J.F.C.C.