

Federal Court



Cour fédérale

Date: 20121015

Docket: IMM-9811-11

Citation: 2012 FC 1201

Ottawa, Ontario, October 15, 2012

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

SALEEM RASHEED KHAMES

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of the decision made by an Immigration Officer of Citizenship and Immigration Canada rejecting the Applicant's application for permanent resident status.

[2] The Applicant arrived in Canada from Kenya in December of 2006. He claims to be a citizen of Somalia, but has never produced any documentation to that effect. He claims that this is

because Somalia has not had a functioning government since 1990, and is unable to issue such documents.

[3] In December 2006, he claimed refugee status in Canada. In May 2008, the Refugee Protection Division (RPD) of the Immigration and Refugee Board rejected his claim. The Federal Court refused leave for judicial review of the RPD's decision on October 6, 2008.

[4] The RPD was not satisfied that the Applicant had established his identity as a Somali citizen. The RPD found that the witnesses testifying in support of the Applicant's claim for refugee status lacked credibility. It also found that the results of a Sprakab linguistic analysis report (the Sprakab report) were an obstacle to his claim. Sprakab examined the Applicant's language and concluded with certainty that the Applicant was not from Somalia, and was most likely from Tanzania. It was conducted by Analyst 249 at the Swedish linguistic analysis company, Sprakab. The RPD was also not satisfied that the Applicant's knowledge of Somalia was at a level above what is available from public sources.

[5] In February 2009, the Applicant married Nasra Said, a Canadian citizen. She sponsored the Applicant in his permanent residence application. Immigration Canada accepted that their marriage was genuine.

[6] In November 2011, the Ministry of Citizenship and Immigration (MCI) Canada wrote to the Applicant to tell him that he was required to submit documentation that established his Somali

citizenship. The Applicant failed to do so. Thus, on December 15, 2011, the MCI refused the Applicant's application for permanent residence.

[7] The Officer noted that the Applicant's permanent residence application was approved in principle. Next, the Officer decided whether to waive the passport requirement and accept the Applicant's statutory declarations instead.

[8] The Officer found the witnesses were not credible.

[9] The Officer put much weight on the Sprakab report, and found that "the language report is particularly discrediting to the applicant's claim of being a national of Somalia..."

[10] The Supreme Court of Canada has held in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] that there are only two standards of review: correctness for questions of law and reasonableness involving questions of fact and questions of mixed fact and law. *Dunsmuir* at paras 50 and 53. The Supreme Court has also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir* at paras 57 and 62.

[11] Upon closer examination of the Sprakab report, I find that the Officer erred in relying on it without regard to internal errors in the report.

[12] First, the Sprakab report is qualified as follows: “The analysis is made more difficult... by the fact that the interpreter constantly interrupts the person...” [Emphasis added]. Linguistic analysis analyzes the various linguistic features of spoken language. I find a question arises whether reliable results can come from data tainted with “constant” interruptions of the subject’s speech.

[13] Second, the Officer noted that “A recording was made... at the offices of the Immigration and Refugee Board for approximately forty minutes.” Yet the Sprakab report notes the length of recording as being 24 minutes. Clearly 24 minutes is only 60% of 40 minutes and not ‘approximately’ 40 minutes.

[14] Third, the Sprakab report sets out the qualifications for their analysts: “In order to be employed at SPRAKAB analysts must have at least a bachelor’s degree in linguistics; it is also recommended that he/she is specialized in a concentration such as phonetics.” [Emphasis added]. Yet, Sprakab’s Analyst 249, who conducted the analysis of the Applicant’s linguist interview, has a degree in language instruction and not linguistics.

[15] It appears to me that Sprakab’s results are questionable at best, and seriously flawed at worst. I find it unreasonable that the Officer relied on the Sprakab report as “particularly discrediting to the applicant“. This is sufficient for me to grant this judicial review.

[16] I also note that Sprakab’s work has been the subject of academic criticism, and that this criticism was before the board. Dr. Derek Nurse of Memorial University is a linguist specialized in African languages, and in particular Swahili and the dialects of Swahili in Somalia. He participated

in a IRB report titled: Immigration and Refugee Board of Canada, *Somalia: Information on whether Kibajuni is commonly referred to as Bajuni; whether a Bajuni who speaks Kibajuni is considered to be speaking Kibajuni or Swahili; whether someone who speaks Kibajuni understand Swahili and vice-versa; whether an interpreter, translator or linguist would refer to Kibajuni as Swahili; information on the differences and similarities between Kibajuni and Swahili and where the two languages are spoken in the world (November 2005)*, 14 November 2005, SOM100785.E. The report identifies Kibajuni and Bajuni as the same dialect. In that report Dr. Nurse stated that, according to his observations, the Sprakab's "recordings suggest that interpreters, translators, or linguists 'are not always sure of the difference' between Swahili and Kibajuni."

[17] The Applicant submits the following question for certification: "Is an immigration officer in an administrative proceeding required to assess whether the author of a report is an expert based on the criminal law standard for the admission of expert evidence found in *R. v. Mohan* [1994] 2 SCR 9."

[18] I do not certify this question, as I am satisfied that the Federal Court has already pronounced on this issue. See Snider J in *Toussaint v Canada (Minister of Citizenship and Immigration)* 2009 FC 873 at para 94; Lemieux J in *Almrei v Canada (Minister of Citizenship and Immigration)* 2007 FC 1025 at para 37; Mosley J in *Re Almrei* 2009 FC 1263 at para 262. Furthermore, I am satisfied that the Federal Court of Appeal has also pronounced on this issue. See *Es-Sayyid v Canada (Minister of Public Safety and Emergency Preparedness)* 2012 FCA 59 at para 41.

[19] The Applicant also submits the following question for certification: “Is there any basis to quash a decision of an immigration officer for relying on an expert report when there was no evidentiary foundation before the officer to challenge the reliability of the report?”

[20] I decline to certify this question since there is evidence sufficient to grant the application for judicial review.

[21] Finally, the Applicant submits this final question for certification: “Can the Court on a judicial review consider fresh evidence submitted by an applicant to assess the reliability of a report relied on by an immigration officer when such evidence was available or obtainable prior to the decision but not proffered for the immigration officer’s consideration?”

[22] I do not certify this question since I do not need to consider fresh evidence since I based my decision on the flaws of the Sprakab report itself.

[23] The application for judicial review is granted.

[24] No question of general importance is certified.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is granted.
2. No question of general importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-9811-11

STYLE OF CAUSE: SALEM RASHEED KHAMES v MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 22, 2012

**REASONS FOR ORDER
AND ORDER:** MANDAMIN J.

DATED: OCTOBER 15, 2012

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