

Federal Court



Cour fédérale

**Date: 20130228**

**Docket: IMM-4254-12**

**Citation: 2013 FC 205**

**Ottawa, Ontario, February 28, 2013**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**HABIB ABDULLAHI AHMED**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of an immigration officer (the officer) at the High Commission of Canada in Nairobi, wherein the applicant was determined not to be a Convention refugee within the meaning of section 96 of the Act.

[2] The applicant requests that the officer's decision be set aside and the application be returned for redetermination by a different officer.

## **Background**

[3] The applicant and his brother, Abdi Abdullahi Ahmed (who is pursuing a parallel judicial review in Court file IMM-4253-12) are citizens of Somalia currently living in Kenya. They fled Somalia in 2007 after their father was killed by a militia group.

[4] The brothers were interviewed separately in February 2012 for their applications for permanent residence under the Convention refugee abroad class and the country of asylum class.

## **Officer's Decision**

[5] A letter dated February 18, 2012, informed the applicant his application had been refused.

The officer described the reasons for refusing the application as follows:

During your interview you provided information about the events that prompted you to and your brother to flee Somalia which contradicted what he told me at interview. You appeared to have memorized the story you told me at interview and were unable to respond genuinely to questions. Since arriving in Kenya you have not sought protection from the UNHCR and have not secured any form of identity documents for yourself. I did not find the explanation you gave me credible. As a result I was unable to confirm your identity.

[6] The officer's notes also provided a record of the interview with the applicant.

## **Issues**

[7] The applicant submits the following points at issue:

1. Does this refusal breach the duty of fairness owed to the applicant on the basis that the visa officer considered extrinsic evidence without disclosure and an opportunity to respond?

2. Did the officer breach fairness by failing to notify the applicant to submit a statutory declaration from his uncle confirming his identity?

[8] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer breach procedural fairness?

### **Applicant's Written Submissions**

[9] The applicant argues the standard of review for the duty of fairness is correctness. The Overseas Processing (OP1) Manual instructs officers that applicants must be aware of the case to be met. This creates a legitimate expectation.

[10] The evidence of the applicant as described in the notes pertaining to his brother's application do not match the notes from this file. The applicant did not say he went in the shop, but that he saw his father's body in the shop. This description is consistent with looking into the shop from outside.

[11] The applicant points out that in his interview, the officer stated that there were differences between the two stories, but did not tell the applicant what those differences were, thereby giving him a chance to respond. Both brothers gave evidence through an interpreter and the slight difference between "in front of the shop" or "in the front of the shop" could only be clarified by

specific questioning, which did not happen here. Both statements regarding the militia could be true: its members could be split between inside and outside the shop.

[12] The applicant argues the refusal letter is incorrect, since he was not given a chance to respond to concerns about inconsistent evidence. This was extrinsic and failing to disclose it is a violation of the duty of fairness.

[13] The applicant argues that while the officer noted the applicant had no identity documents, section 178 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 allows an applicant to submit a statutory declaration. This could have been provided by the applicant's uncle, but was not on the list of requested documents from the officer. The Regulation applies to protected persons in Canada, but there is no reason in principle why identity documents accepted inland should not be acceptable abroad. There was a breach of the duty of notification.

### **Respondent's Written Submissions**

[14] The respondent agrees that the standard of review is correctness. This Court has previously found that interviewing family members separately for the Convention refugee abroad class is not a violation of procedural fairness. It is sufficient for the officer to raise the relevant issue from a separate interview without providing full transcripts. In this case, the officer did so. The applicant has not provided an affidavit suggesting that he was unaware of his brother's evidence or unable to address the officer's concerns, nor any response that he would have provided if given the

opportunity. Even if the brother's evidence was extrinsic, the applicant was given a chance to respond.

[15] On the subject of identity, the respondent points out the applicant provided no documents and claimed to have no identity documents after five years in Kenya. The list of documents in the letter from the officer was generic and there was no requirement to list a statutory declaration. Regulation 178 is inapplicable as this is not an inland application. It is not clear a statutory declaration would have alleviated the officer's concern about the applicant's identity. The onus was on the applicant.

#### **Applicant's Further Written Submissions**

[16] The applicant argues the cases identified by the respondent are those where the officer alerted the interviewees to the differences between interview evidence. This was not done here, as the officer only referred to differences without providing any specificity. The applicant was foreclosed from responding to the officer's concern since he had no idea what details the officer was concerned with. The applicant was invited to guess at what his brother had said that contradicted his evidence. The importance of this decision requires a high level of procedural fairness.

[17] The policy rationale for Regulation 178 is that in some countries, it is impossible to obtain identity documents. That applies equally to refugee claimants abroad. No one who read the officer's letter would believe a statutory declaration would satisfy the officer.

## **Respondent's Further Written Submissions**

[18] The respondent argues the duty of fairness is variable. This Court has held an officer is not required to describe concerns relating to contradictory interviews in detail. On the matter of identity documents, the applicant had been put on notice to provide evidence of his identity and he failed to do so.

## **Analysis and Decision**

### **Issue 1**

#### **What is the appropriate standard of review?**

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[20] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 798 at paragraph 13, [2008] FCJ No 995, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[21] **Issue 2**

Did the officer breach procedural fairness?

The officer's notes describe the exchange where the inconsistency in the interview content was put to the applicant:

NOTED THE STORY ABOUT HIS FATHER'S DEATH DIFFERS FROM HIS BROTHER TOLD ME. PA SAYS THAT THE DEATH OCCURRED ON 17 JULY 2007. IT MAY HAPPEN THAT HE DID NOT CORRECT THE MISTAKE ON THE PERSONS FORM. THE PERSON ASSISTING HIM WROTE THE WRONG DATE.

NOTED THE ISSUE WAS NOT THE DATE BUT THE DETAILS AND DESCRIPTION OF WHAT HAPPENED THAT DAY. PA SAYS THEY WERE AT THE MARKET, THEY DIDN'T SEE WHAT HAPPENED. WHEN THEY CAME BACK THEY SAW THE MILITIA STILL THERE. ITS BEEN A LONG TIME AND THEY ARE TRYING TO REMEMBER WHAT HAPPENED AFTER A LONG TIME, BUT IT IS HARD.

[22] It is clear from this description that the applicant had no idea what inconsistency the officer was referring to. In the notes, the officer indicated that he had a very specific inconsistency in mind:

THE PA SAID THE FATHER WAS DEAD INSIDE THE STORE THAT THE MILITIA GROUP WAS LOOTING WHILE HIS BROTHER STATES THAT THEY COULD NOT GO INSIDE THE STORE BECAUSE THE MILITIA GROUP WAS INSIDE LOOTING THE STORE.

[23] I would note there is not necessarily a contradiction between these two statements due to the simple possibility that the brothers could see into the store without entering it. If there is a contradiction, it seems an incredibly minor one given the brothers were describing a traumatic event from five years earlier, through an interpreter.

[24] As a matter of procedural fairness, however, the question is whether the officer put the concern of ostensibly contradictory evidence to the applicant is specific enough in terms that he can be said to have had a fair opportunity to know the case to be met.

[25] The respondent relies on three decisions of this Court: *Osman v Canada (Minister of Citizenship and Immigration)*, 2012 FC 906, [2012] FCJ No 1006; *Ali v Canada (Minister of Citizenship and Immigration)*, 2012 FC 710, [2012] FCJ No 886; and *Musse v Canada (Minister of Citizenship and Immigration)*, 2012 FC 883, [2012] FCJ No 1056. The respondent argues these cases held that analogously vague descriptions of credibility concerns did not violate procedural fairness.

[26] In *Ali* above, the credibility concern was put to the applicant, but there is no indication the officer was concerned with contradictory evidence (at paragraphs 19 and 20).

[27] In *Osman* above, the officer asked specific questions about discrepancies in interview evidence, namely, the duration of the family members' detention and three other areas of conflict (at paragraph 15). The Court found that the officer gave her a fair chance to present her version of events. This is not analogous to the case at bar, where the applicant was simply informed there was a discrepancy in the "description of events" and given no further detail.

[28] In *Musse* above, Mr. Justice James O'Reilly agreed that the officer did not make clear what the inconsistencies were and found that it would have been better if she had (at paragraph 28).



However, he found that the inconsistency was just one of a series of concerns related to credibility, and the applicant had had a chance to respond to all other concerns.

[29] I do not believe that in this case, the inconsistency concerning the father's death can be said to be "only one of a series of concerns" about the applicant. Although the officer was also concerned with the applicant's lack of identity documents, the contradictory evidence was cited as the primary reason for refusal in both the officer's notes and the refusal letter.

[30] There was no reason for the officer not to inquire further; indeed, simply asking the applicant to repeat his description of the events might have yielded a result more harmonious with his brother's narrative given the inconsistencies of speaking through an interpreter and the microscopic inconsistency identified by the officer. To deny the applicant this simple opportunity is a breach of procedural fairness.

[31] Credibility was a major reason given for the refusal of this application and the applicant was not given a chance to respond to the central credibility allegation against him. It is therefore not obvious how the officer would have decided the application had procedural fairness been respected.

[32] The application is therefore granted and the matter returned to Citizenship and Immigration Canada for redetermination.

[33] The applicant proposed four serious questions of general importance for my consideration for certification:

1. In an application for permanent residence at a Canadian visa office abroad, does the visa office breach the duty of fairness owed the applicant by basing the decision in part on an interview with another, related applicant, but not disclosing the part of the other interview to the applicant which contradicts the applicant's evidence with an opportunity to respond?
2. Is there a breach in the duty of fairness owed an application for immigration at a visa post abroad where
  - a) the visa office interviews related applicants separately,
  - b) refuses the application of the applicant based on inconsistencies with the interview of the other related applicant, and
  - c) the visa office does not disclose to the applicant the inconsistencies with an opportunity to respond?
3. Does the visa office breach the duty of fairness by failing to notify a person who is applying for permanent residence at a visa post abroad as a member of the Convention refugee abroad class or a member of the humanitarian protected persons abroad designated class that the visa office will consider statutory declarations of identity where there is a reasonable and objectively verifiable explanation related to the circumstances in the applicant's country of nationality or national residence for the applicant's inability to obtain an identity document?
4. Can a decision stand despite a breach of the duty of fairness solely because there is another basis for the decision than the conclusion reached in breach of the duty of fairness?

[34] The respondent did not wish to submit a proposed serious question of general importance for my consideration for certification but opposed the certification of the applicant's questions.

[35] I am not prepared to certify the proposed serious questions as they do not transcend the interests of the immediate parties nor do they contemplate issues of broad significance or general application (see *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] 176

NR 4 (FCA), [1994] FCJ No 1637 at paragraph 4). The level of procedural fairness for each case depends on the facts of the case.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the application for judicial review is allowed and the matter is returned to a different officer for redetermination.

“John A. O’Keefe”

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Judge

## ANNEX

**Relevant Statutory Provisions*****Immigration and Refugee Protection Act, SC 2001, c 27***

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4254-12

**STYLE OF CAUSE:** HABIB ABDULLAHI AHMED

- and -

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Winnipeg, Manitoba

**DATE OF HEARING:** February 20, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** February 28, 2013

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