Federal Court  Cour fédérale

Date: 20140709

Docket: IMM-1677-13

Citation: 2014 FC 668

Ottawa, Ontario, July 9, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MUSTAFA JAMA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Mr. Mustafa Jama (the Applicant) of a decision made by a Senior Immigration Officer, C. Kratofil (the Officer) of Citizenship and Immigration Canada (CIC) rejecting the Applicant's application for Pre-Removal Risk Assessment (PRRA). The Officer found that the Applicant would not be at risk of persecution under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA* or *Act)*, subject to a danger of torture under section 97(1)(a) of the *IRPA*, or face a risk to his life or a risk

of cruel and unusual treatment or punishment if returned to his country of origin under section 97(1)(b) of the *IRPA*.

[2] For the reasons that follow, I have found that this application for judicial review ought to be allowed.

I. Facts

[3] The Applicant, Mr. Mustafa Abdikarim Jama (a.k.a. Mustafa Abdikar Jama) is a citizen of Somalia. He alleges that he is a member of a minority clan, the *Ashraf*.

[4] The Applicant claims that he left his home city of Kismayo in 2000 after rival militaries turned the town into a war zone. He entered the United States where he claimed refugee status. However, he was detained in the United States because he traveled with a fraudulent travel document. He was released after 8 months and was granted a withholding of removal. He lived in Minnesota until 2003, at which time he voluntarily departed as he could no longer provide for himself.

[5] The Applicant returned to Kismayo in September 2003 and married in December of that same year. He opened a tailor shop in the town market. A son was born in 2005. However, in July 2008, he alleges that he was kidnapped by militants from a young extremists group, al-Shabaab, a group associated with al-Qaeda, and held for ransom. On that same day, he managed to escape before his wife could pay the ransom. However, as soon as he returned home, the kidnappers retaliated by shooting his wife dead.

[6] The Applicant then left Somalia for Kenya and stayed there for a few weeks, until such time as he travelled to Canada on October 16, 2008 using a fake Kenyan passport. He sought protection on November 13, 2008 alleging a well-founded fear of persecution on the basis of race, as he claims to be a member of the *Ashraf* minority clan, and imputed political opinion as he opposed Islamist militias. The Applicant's refugee claim was refused by the Refugee Protection Board (RPD) on August 19, 2010. The member of the RPD found that the Applicant had failed to establish his identity or a nexus to a *Convention* ground. The Applicant appealed this decision; however, the judicial review was dismissed by the Federal Court on June 14, 2011 (*Jama v Canada (Minister of Citizenship and Immigration)*, 2011 FC 696).

[7] In July 2011, the Canada Border Services Agency (CBSA) served the Applicant with a PRRA application under section 112 of the *IRPA*. It is alleged that the Applicant has extremely limited income, however, he did not qualify for Legal Aid Ontario and as such submitted his PRRA application without the assistance of counsel. This was the first time he had submitted an immigration application and he had less than a grade 10 education. On January 10, 2013 the decision came back negative.

II. Decision under review

[8] The Officer found that there is less than a mere possibility that the Applicant will face persecution in Somalia as described in section 96 of the *IRPA*. The Officer found as well that there are no substantial grounds to believe that the Applicant will face a danger of torture, nor are there reasonable grounds to believe that he would face risk to life or risk of cruel and unusual treatment or punishment as described in section 97 of the *IRPA*.

[9] The Officer noted that the RPD had found that the Applicant did not establish his identity as a national of Somalia or a member of the *Ashraf* clan. While the RPD acknowledged that there is a lack of identification documents in Somalia, the Applicant had previously lived and worked in the United States. As such, it was not reasonable that he had made no efforts to attempt to obtain any information from the U.S. authorities or the butcher shop where he had previously been employed for two years. The RPD found that there were inconsistencies and negative inferences as to the Applicant's credibility.

[10] The Officer accepted that "[c]ountry conditions in Somalia are less than ideal" and that these have "deteriorated since the finding of the RPD…". The Officer quoted the following from the US Department of State's 2011 *Country Reports on Human Rights Practices* for Somalia:

> Conflict-related abuses, including killings, displacement, and restriction of humanitarian assistance continued to severely impact civilians. According to the UN, there were 1.36 million internally displaced persons (IDPs) in the country and 955,000 persons had taken refuge in other countries, primarily due to conflict, famine, and drought. Approximately 300,000 Somali refugees arrived in Kenya, Ethiopia, Djibouti, and Yemen during the year. The rule of law was largely nonexistent. Al-Shabaab controlled most of the south and central regions, where it committed human rights abuses including killings, torture, restriction of humanitarian assistance, and extortion. On August 6, al-Shabaab withdrew from most areas of Mogadishu, but in the following months it continued attacks in the city.

[11] The Officer noted, however, that the submissions provided by the Applicant describe general country conditions and that he was not specifically mentioned in any article. Nor did the Applicant explain how these submissions will assist in assessing the personalized and future risks he would face.

[12] The Officer concluded that the evidence did not support a risk for the Applicant in Somalia other than that shared by the general population. The Officer found that the Applicant failed to show how his personal circumstances are such that there is a nexus to the Convention grounds or that his personal circumstances are such that the risk is not shared generally by others in the country.

III. Issues

[13] This application for judicial review raises the following two questions:

A. What is the appropriate standard of review?

B. Did the Officer err in not conducting an assessment of the Applicant's objective risk profile based on recent and publicly available documentation?

IV. Analysis

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

[14] The Applicant submits that the substantive issue raised in the case at bar is whether or not the Officer erred in failing to assess a risk ground apparent in the record or through easily verifiable documentary sources. According to the Applicant, the Officer failed to recognize or to make any findings on the risk to "westernized" Somalis if returned to al-Shabaab territory. Relying on the decision of Justice Rennie in *Varga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 494, counsel argues that this is equivalent to a denial of a procedural fairness and calls for a correctness standard of review.

[15] I am unable to agree with this argument. Even assuming that a failure to address a ground of persecution or risk can be tantamount to a breach of procedural fairness, the Court is not faced with such in the case at bar. The risk which the Applicant would allegedly be exposed to as a "westernized" Somali was not raised in his submissions and was not apparent on the face of the record. It may not have been reasonable for the Board not to address it in its assessment of the Applicant's objective risk, an issue that will be dealt with in the next section of these reasons; however, I do not think it amounts to a breach of procedural fairness: see, *Ameeri v Canada (Minister of Citizenship and Immigration)*, 2013 FC 373, at paras 20-21.

[16] It is well established that assessments of claims under sections 96 and 97 of the *IRPA* are questions of mixed fact and law, and call for a standard of reasonableness: see, *A.B. v Canada (Minister of Citizenship and Immigration)*, 2008 FC 394; *Casteneda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1012. As such, the Court shall not interfere if the officer's decision is transparent, justifiable and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59.

B. *Did the Officer err in not conducting an assessment of the Applicant's objective risk profile based on recent and publicly available documentation?*

[17] It is trite law that the PRRA engages the state's independent and fundamental obligation not to *refoule* individuals to torture, persecution and other impermissible outcomes. It is clear

that Parliament's intention in enacting the PRRA process was to comply with Canada's domestic and international commitments to the principle of *non-refoulement*: see *Figurado v Canada (Solicitor General)*, 2005 FC 347, at para 40; *Revich v Canada (Minister of Citizenship and Immigration)*, 2005 FC 852, at para 14; *Solis Perez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 663, at para 23, aff'd 2009 FCA 171; *Ragupathy v Canada (Minister of Public Security and Emergency Preparedness)*, 2006 FC 1370, at para 27. As a result, a PRRA officer cannot confine or exhaust its analysis to the exact arguments raised by an applicant or even to the exact evidence presented.

[18] For example, officers have a duty to consult recent and publicly available reports on country conditions even when they have not been submitted by the applicants: *Rizk Hassaballa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 489, at para 33; *Reis Lima v Canada (Minister of Citizenship and Immigration)*, 2008 FC 222, at para 13; *Kulasekaram v Canada (Minister of Citizenship and Immigration)*, 2013 FC 388, at para 42; *John v Canada (Minister of Public Security and Emergency Preparedness)*, 2010 FC 1088, at para 37; *Jessamy v Canada (Minister of Citizenship and Immigration)*, 2009 FC 20, at para 81. I agree with counsel for the Applicant that if PRRA officers' findings are to attract deference from this Court on judicial review, the Court must be satisfied that the PRRA's officer's expertise is based on meaningful research and an intimate familiarity with the current country conditions in the applicant's country of removal. Such an approach is also consistent with the UNHCR Handbook, according to which "the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner": *Handbook on Procedures and Criteria for Determining Refugee*

Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCP/IP/4/Eng/REV.1, Reedited, Geneva, January 1992, UNHCR 1979.

[19] It is also incumbent on PRRA officers to consider risk grounds that are apparent on the record, even if these are not specifically raised by the applicant: *Viafara v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1526, at paras 6-7. The origin of this duty can be traced to the Supreme Court's seminal judgment in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, where the Court unanimously held (at pp 745-746) that "[a] claimant is not required to identify the reasons for the persecution. The examiner must decide whether the *Convention* definition is met; usually there will be more than one applicable ground."

[20] Such a duty does not evaporate even if an applicant is found not to be credible. This Court has held that Officers must still assess personal factors that can be objectively identified or verified to determine whether the Applicant's profile would put her/him at risk upon return. That approach was adopted, for example, by Justice Mactavish in *Bastien v Canada (Minister of Citizenship and Immigration)*, 2008 FC 982:

> [8] The fact that the Board did not believe Ms. Bastien's story is not, however, the end of the matter, as Ms. Bastien also claimed to be at risk in Haiti because she was a woman.(…)
>
> [10] Ms. Bastien's alternative claim was based upon her status as a Haitian woman, and as an individual returning to Haiti from abroad. The fact that she has been found not to be credible with respect to the facts underlying the portion of her claim based upon the political activities of Ms. Bastien and her partner was irrelevant to this aspect of her claim.
>
> [11] Given that there is no dispute about the fact that Ms. Bastien is indeed a Haitian woman, or that she would in fact be returning from abroad if she went back to Haiti, the question for the Board at

> this juncture in its analysis was not whether her story of past persecution was credible.
>
> [12] Rather, the questions that the Board ought to have addressed in relation to this aspect of Ms. Bastien's claim included determining whether there was documentary or other evidence before it as to the generalized persecution of women in Haiti. In addition, the Board ought to have considered whether women in Haiti generally, as well as those returning to Haiti from abroad, constituted particular social groups.

[21] I also agree with counsel for the Applicant that in the case at bar, there were additional reasons to impose a heightened duty on the Officer. First, the Applicant completed his application without the assistance of counsel, and as stated in *Hillary v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 51 at para 34, "[w]ithout representation, an individual may not [*sic*] able to participate effectively in the decision-making process, especially when facing a more powerful adversary, such as a government department". Second, the PRRA application was decided 18 months after it was submitted and as such an officer would have been keenly aware that the country conditions documentation enclosed may have become out of date. Where the government exercises its statutory right to delay making a prompt PRRA decision, it cannot ignore its constitutional duty to ensure that the decision is not stale or illusory when it is finally made. Third, the Applicant comes from a very dangerous country. Somalia is not listed as a designated country of origin under section 109.1 of the *IRPA* but rather there is a Temporary Suspension of Removal over parts of the country under section 230 of the *Immigration and Refugee Protection Rules*, SOR/2002-227 (not including the Applicant's home region) which attests to the dangerousness in the country and the "generalized risk to the entire civilian population". Indeed, the Officer acknowledged that country conditions have worsened since the finding of the RPD. As such, the government's obligation against *refoulement* should be at its

highest and the Officer ought to have ensured all possible risk grounds are assessed. Finally, a number of significant statutory amendments have been made to the *IRPA* since the submission of the PRRA application, with the result that the Applicant can no longer submit a new PRRA application immediately after the refusal of the first one; he must now wait for a period of 12 months before submitting another one. Again, this puts a somewhat higher burden on the Officer to fully assess the Applicant's risk prior to the removal and to consider all possible grounds based on the most current evidence.

[22] On the basis of the foregoing, I agree with counsel for the Applicant that the Officer erred in not assessing the Applicant's objective risk profile against recent and publicly available reports. The Officer in the present case was faced with four salient facts about the Applicant's profile which were never doubted or disputed before the IRB or in the PRRA decision: (i) he is male; (ii) he is under the age of 30; (iii) he is from Kismayo, Somalia; and (iv) he has spent the last five years in Canada and lived at least three more years in the United States prior to that. Nowhere did the Officer express any doubt as to the fact that the Applicant hails from Kismayo. Even discounting the Applicant's minority clan membership and every other element of his risk narrative, the question for the Officer remained: based on recent and publicly available information, would the Applicant be at risk if returned to Somalia based on his objective profile?

[23] A review of the recent and publicly available country conditions document shows that Kismayo has been in the firm control of al-Shabaab militants since the Applicant left Somalia in 2008. Indeed, the Officer herself consulted the US Department of State's *Country Reports on Human Rights Practices for Somalia* in the course of her decision. That report provides ample

documentation as to al-Shabaab's long-term control of the city. Moreover, it also indicates that al-Shabaab has been in a state of protracted armed conflict for the four months preceding the Officer's decision as the Transitional Federal Government and African Union troops attempt to dislodge it from the city.

[24] Armed with the fact that the Applicant was a young male returning to or through al-Shabaab held territory after living in the West for many years, the Officer should have been aware of an alarming risk ground that required assessment. In fact, international and national courts have held that the return of "westernized" males either through or to al-Shabaab controlled areas of Somalia, places such persons at extreme risk. The European Court of Human Rights found twice that removal to Somalia poses a particularized and intolerable risk to westernized men who would be subject to reprisals by al-Shabaab: *Sufi and Elmi v United Kingdom (Nos 8329/07 and 11449/0)*, Chamber of the European Court of Human Rights, 28 June 2011, at paras 273-277; *Hirsi and Others v Italy (No 27765/09)*, Grand Chamber of the European Court of Human Rights, February 2012 at paras 150-151.

[25] I agree with counsel for the Applicant that these objective facts before the Officer should have triggered the need for a section 97 assessment in this case. The Applicant is a young male who has lived in the West for at least nine years since 2000, and he fled Kismayo the same year al-Shabaab seized control. The Officer failed in not addressing or assessing this risk in any manner whatsoever. It did not matter that the RPD was not convinced of the Applicant's identity and his membership in the *Ashraf* clan. The profile of the Applicant, based on objective and ascertainable characteristics, called for a risk assessment. This is not to say that a personalized

risk is a foregone conclusion; but the Officer had an obligation to consider that risk, even if not raised explicitly by the Applicant.

[26] Counsel for the Respondent objected to the Applicant introducing "new evidence" at the judicial review stage, as it was not placed before the PRRA Officer. This argument is misplaced. For the Court to be able to assess the reasonableness of the Officer's fulfillment of her duty to conduct updated country conditions research, the Applicant must be allowed to demonstrate what obvious and apparent country conditions were ignored by the Officer. The new evidence included in the Applicant's record tends to demonstrate that the Applicant's hometown of Kismayo has been in the firm control of al-Shabaab since 2008, and that international and domestic courts have held that returning or even transiting a westernized Somali national through al-Shabaab territory could pose a serious threat to their life. That evidence was therefore admissible for the limited purpose of assessing the Officer's fulfillment of her duty to conduct independent and updated country conditions research and merely corroborates what was clearly in the documents which were at the Officer's disposal such as the IRB's *National Documentation Package* for Somalia or the US Department of State's 2011 *Country Reports on Human Rights Practices for Somalia*.

[27] In light of the above, the decision of the Officer must be set aside. The Officer was obliged to assess the objective risk awaiting the Applicant and the Applicant was entitled to receive such an assessment prior to removal. The Applicant cannot be returned to a country as violent as Somalia without an assessment of the risks he would face on the basis of his profile. It is not the task of this Court sitting on a judicial review to analyze the country conditions

evidence and to determine for itself whether the Applicant's claim should succeed. For that reason, the matter shall be returned for re-determination by a different Officer.

[28] Neither party has suggested a question for certification and none arises.

JUDGMENT

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

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1677-13
STYLE OF CAUSE:	MUSTAFA JAMA v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 28, 2014
JUDGMENT AND REASONS:	DE MONTIGNY J.
DATED:	JULY 9, 2014

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