Date: 20050518

Docket: IMM-8156-04

Citation: 2005 FC 714

BETWEEN:

LUL MAHAMED SHAFI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

PHELAN J.

BACKGROUND

[1] The Applicant is a refused refugee claimant; the Refugee Protection Division (RPD) having concluded that she was not credible with respect to her claimed nationality as a Somali.

[2] Her Pre-Removal Risk Assessment (PRRA) application was dismissed firstly on the grounds that she had not produced "new evidence" in accordance with section 113(a) of the Immigration and Refugee Protection Act (IRPA); secondly and in any event, her evidence did not established her Somali nationality.

[3] The PRRA Officer found that the Applicant had not explained why the "new" evidence was not presented at the RPD hearing which had denied her claim for refugee protection. In finding against the Applicant, the Officer drew a negative inference as to credibility from the fact that one of the pieces of new evidence was a letter rather than an affidavit; held that the Officer's own research did not provide evidence of the existence of the Applicant's tribe; concluded that evidence of the Applicant's nationality given by a close family friend and by a cousin held little weight because those individuals were not disinterested in the outcome. The Officer reached theses conclusions without conducting a hearing into this matter.

[4] The Applicant sought judicial review of the PRRA decision. For the following reasons, this judicial review application will be granted.

FACTS

[5] The Applicant is a 24 year old single female who claimed that she is a citizen of Somalia. She has a sister in Ottawa who arrived in Canada a few years earlier and whose identity as a Somali and a refugee or person in need of protection had been accepted by the RPD.

[6] The Applicant came to Canada in April 2001 via the USA.The RPD concluded, despite the evidence of the Applicant and her sister, that her claim to being a Somali national was not credible. A fair reading of this RPD decision is that the RPD did not accept the sister's evidence of their respective Somali nationality. This conclusion was reached despite the RPD previously having granted the sister refugee status on the basis of her Somali nationality, her membership in the Somali clan/tribe Reer Baraawe (or Bravan) and the persecution of members of this clan/tribe in Somalia.

[7] In the PRRA decision, the Officer dismissed the new evidence which consisted of:

- a statutory declaration of Mr. Ouseman Haji Ibrahim, a Canadian citizen, who swore that he knew the Applicant in Somalia, that she had lived in Somalia and he had visited her family from time to time when she was a baby. He also confirmed that she was a member of the Brava clan. He was a cousin of the Applicant's mother and had last seen her in 1990 before seeing her again in Canada in 2001;

- a statutory declaration of a Mr. Mohamed Rashid Haji, a Canadian citizen who attested to his own membership in the Brava clan, his knowledge that the Applicant was from the same clan, acquainted with her father and her grandfather who also was a member of the Reer Baraawe minority in Somalia;

- a letter from Mr. Abdinzak Kasod, Executive Director of the Somali Centre for Family Services in Ottawa stating that the Applicant was a member of the Reer Baraawe minority tribe in Somalia.

[8] In rejecting the Applicant's evidence, the Officer made the following critical findings or reached the following conclusions:

- the RPD decision turned on credibility and having reviewed it and the Applicant's submission, the Officer accepted the RPD's conclusion on credibility;

- the new evidence did not meet the requirements of section 113(a) of IRPA and should not be accepted;

- even considering the new evidence, it does not establish Somali or tribal/clan identity;

- Mr. Karod should have been aware of the decision in *Hawa Khalif Said v Minister of Citizenship and Immigration,* F.C.T.D., IMM-3411-96, 9 May 1997 and therefore should have filed an affidavit rather than a letter; (the Officer drew a negative inference from his failure to do so;

- Mr. Karod failed to explain how he knew that the Applicant was a member of the Reer Baraawe Tribe and the Officer's own independent research did not provide any information on such a tribe or clan in Somalia;

- the two affidavits came from persons identified as a close family friend and a cousin each of whom are not disinterested in the outcome;

- the documents filed were entitled to little weight.

ANALYSIS

[9] There are two key issues in this case:

(a) whether the new documents meet the requirements of IRPA section 113 (a);

(b) whether the decision on the facts should be subject to judicial review.

[10] The standard of review with respect to the first issue is correctness as to law and reasonableness *simpliciter* as to the application of the facts to the law. The standard of review with respect to the Officer's factual analysis is patent unreasonableness.

SECTION 113(a) CONSIDERATIONS

[11] The relevant provision of IRPA reads as follows:

113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. . . .	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet . . . .

[12] The Officer, in reaching the conclusion that the evidence did not fall within section 113(a), was significantly influenced by the RPD decision. That RPD decision is itself problematic as it is a clear effort to resile from the RPD's own finding in respect of the sister's positive refugee finding that the sister was Somali, a member of the specific tribe and subject to persecution. That decision suggests an opaque finding that the two are not sisters. The RPD's decision raises a question of whether there was an issue of estoppel both with respect to the sister's and the Applicant's nationality. There is no evidence that any efforts have been made to reopen the findings with respect to the sister. There was no findings that they were not in fact sisters. Therefore it must be taken that the two sisters, similarly situated, received very different treatment by the RPD.

[13] For purposes of this judicial review, the relevant phrase of section 113 (a) is the right of PRRA applicant to present "only new evidence . . . that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of rejection" (by the RPD).

[14] It is difficult to contemplate a better witness as to the Applicant's identity than her sister whose claim was almost identical to that of the Applicant and whose claim had been accepted by the same decision making body. There is nothing before the Court which would suggest that the Applicant should have anticipated the RPD's attack on the Applicant and, more importantly, her sisters's credibility.

[15] The Officer is critical of the Applicant and her counsel for not explaining why the new evidence, two affidavits and a letter, were not before the RPD. With respect, the answer seems obvious: that there was no need for this type of evidence in view of the previous findings of the RPD in respect of the sister. At least on the point of national identity, if one sister was found to be Somali by birth, except for some unusual circumstances, the other sister would also be found to be Somali.

[16] Therefore, the Court finds that the Officer's conclusion that the new evidence did not meet the requirements of section 113(a) of IRPA is not reasonable because the Applicant could not reasonably have been expected in the circumstances to have presented the evidence to the RPD.

FACTUAL CONSIDERATION - NATIONAL IDENTITY

[17] As the Officer went on to consider the issue of whether national identity had been established, it is necessary to deal with that finding. While the standard of review of the factual finding is patent unreasonableness, where the process of reaching that conclusion involves issues of fairness, natural justice or law, the standard is correctness.

[18] The Respondent argues that since the finding of national identity is based on sufficiency of evidence, there was no requirement to hold a hearing pursuant to IRPA section 113(b) and section 167 of the Regulations; each of which reads:

113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
. . .	. . .
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	*b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
. . .	. . . .
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167. For the purpose of determining	167. Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à

whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;

(b) whether the evidence is central to the decision with respect to the application for protection; and

(c) whether the evidence, if accepted, would justify allowing the application for protection.

décider si la tenue d'une audience est requise :

a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;

b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[19] The Officer's finding of sufficiency of evidence cannot be divorced from the Officer's credibility findings. The first of these findings is the Officer's adoption of the RPD's credibility conclusions. While that conclusion alone may not be sufficient to trigger the need for a hearing, that conclusion combined with the Officer's adverse inference about a letter in lieu of an affidavit and the comments about not finding any information about the clan or tribe, leads to the conclusion that the Officer did not find the Applicant and her witnesses to be believable.

[20] Sections 113(b) of IRPA and 167 of the Regulations do not create a statutory obligation to conduct an oral hearing even where credibility is in issue.

[21] However, the two sections when read together raise a presumption in favour of an oral hearing where the enumerated factors arise. This is nothing more than a codification of some of the principles of natural justice and of fairness.

[22] In this case, the Officer never considered the applicability of these provisions. Moreover where credibility of this type was in issue, the presumption in favour of an oral hearing is strong. It becomes more than a presumption where the decision maker embarks on independent research, concludes in the negative as to the Applicant's submission and never allows the Applicant to address the results of this independent research.

[23] The Court is of the view that the failure to conduct an oral hearing was, at the very least, a breach of the principal of natural justice and fairness.

[24] The Officer's factual conclusions can only be reviewed on a standard of patent unreasonableness which is defined as "unreasonableness on its face, unsupported by evidence, or vitiated by failure to consider proper factors or failure to apply appropriate procedures". The decision is said to be patently unreasonable where ". . it was made arbitrarily or in bad faith, it cannot be supported by the evidence or

the Minister . . . . failed to consider appropriate factors". *Suresh v. Canada (Minister of Citizenship and Immigration*,[2002] 1 S.C.R. 3 at paragraphs 41 and 29.

[25] The first factual finding subject to attack is the negative inference drawn because a witness filed a letter rather than an affidavit. The Officer based this conclusion on the premise that the witness should have known of the Court's decision in *Hawa Khalif Said v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 1854 (F.C.T.D.).

[26] These are two points to be made in regard to this conclusion. The first is that the decision does not hold that a letter is not acceptable evidence or that identity has to be established by affidavit. The second is that the decision is an unsupported Order of Justice Lutfy (as he then was) which is neither available on Quick Law nor on this Court's own website. There is no sound basis for the Officer's conclusion or the drawing of a negative inference. The Officer might reject the letter for non compliance with section 178 of the Regulations but there is no basis for drawing a negative inference.

[27] The Officer gives little weight to other witnesses' affidavit evidence because it comes from a close family friend and a cousin. The Officer fails to explain from whom such evidence should come other than friends and family. Section 106 of IRPA recognizes the difficulty in providing national identity with the usual documentation (birth certificates, passports, etc) from countries having unstable civil administration.

[28] The Officer failed to consider what other sources of national identity could or should have been produced when she rejected the sworn affidavit of two Canadian citizens. There must be a better basis for rejecting this evidence otherwise the decision is plainly arbitrary.

[29] Lastly, the Officer engaged in independent research from which she concluded that there was no evidence of the Reer Baraawe tribe/clan. This conclusion clearly affects the Officer's determination as to proof of national identity. It also goes to the Officer's credibility findings.

[30] Assuming, without concluding, that a PRRA Officer may conduct independent research, there are at least two further requirements. Firstly, it has to be full, fair and accurate research. Secondly, where it is to be used against a party, that party is entitled to notice and to an opportunity to be heard on the results of the research.

[31] The tribe/clan and its members are also referred to in evidence and other documents by various spelling similar to Reer Baraawe (ie "Brava"). The people are referred to as Bravanese or similar spellings. There are several references to the Bravenese clan in the documents listed under the heading "Summary of Supporting Documents" which was attached to the Applicant's PPRA application. These are documents from such organizations as the UNHCR, Amnesty International and US Department of State.

[32] Since there is no evidence of how or what was independently researched by the Officer and yet there exists documents which refer to the Applicant's tribe/clan (or a reasonable approximation), the Officer's conclusions are not supported by any evidence and the Officer failed to consider evidence presented in the PRRA application.

[33] For these reasons the Court finds that the Officer's decision does not adhere to the principles of natural justice and fairness and is patently unreasonable.

CONCLUSIONS

[34] For these reasons, the application for judicial review will be granted. An order will be issued quashing the PRRA decision and remitting the matter back for a determination by a different officer.

[35] At the time of the hearing, the parties did not believe that there was a question for certification. In fairness to the parties, I will refrain from issuing the Order for 14 days from the issuance of these reasons (subject to no enforcement action under the PRRA decision) to allow the parties to consider their position and make submissions on a certified question, if they have altered their position.

"Michael L. Phelan"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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