Date: 19990312

Docket: IMM-580-98

BETWEEN:

MAHAMUD HUSSEIN ELMI

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

MCKEOWN J.

[1] The applicant, a Somalian citizen who was 16 years old at the time of the hearing, seeks judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board ("the Board") dated January 27, 1998, in which it determined that the applicant is not a Convention refugee.

Issues

[2] The issues are as follows: Whether the Board erred in law in its finding that the Internal Flight Alternative ("IFA") test was met. Secondly, does the *International Convention of the Rights of the Child of 10 November 1989* ("the U.N. Convention on the Child") provide a standard or "yardstick" for determining reasonableness in this context? Thirdly, did the Board use specialized knowledge in a manner contrary to ss. 68(4) and (5) of the *Immigration Act* ("the Act")

The Facts

[3] The applicant was born January 15, 1981, in Kismayo, Somalia. He is a member of the Darod clan, sub-clan Majertan. He lived in Kismayo until he was ten years old, when the city was invaded in 1991. During the invasion, he was separated from his family. He travelled by truck to the Kenyan border, where he was reunited with his maternal aunt, Fadumo Khalif, who took him to a refugee camp in Kenya. In 1993, Fadumo Khalif was sponsored by her husband who had been accepted as a Convention refugee in Canada. The applicant was then sent to stay with another aunt in a refugee camp in Kenya, and in September 1996, the applicant was sent to Canada to join his aunt Fadumo Khalif and her family. His claim for refugee status was heard on March 20, 1997 and continued on January 15, 1998. His claim was based on a fear of persecution as a member of the Darod clan, sub-clan Majertan, as a young male subject to forcible recruitment. The Board raised the possibility of the applicant

having an IFA in Bossaso and provided him with an opportunity to make submissions on this issue at the hearing.

[4] At the refugee hearing, the aunt, Fadumo Khalif, testified that she had no brothers or sisters left in Somalia. She filed sworn evidence that she had not heard from the applicant"s mother, father or his eight brothers or sisters since 1991. She testified that she had made inquiries through the Red Cross in Kenya and through the Somalia grapevine concerning the whereabouts of the applicant"s mother and his family, but she had not been able to find them. There are no known relatives of the applicant in Bossaso. The applicant has an aunt, her husband and family, as well an uncle and a cousin in Canada.

[5] The test to be applied to determine whether an IFA exists is set out in *Rasaratnam v. M.E.I.* reflex, [1992], 1 F.C. 706 (F.C.A.). The Court of Appeal held that two criteria must be established before an IFA can be said to be available, namely, whether there is no serious possibility of the applicant being persecuted in the part of the country where the Board finds that an IFA exists, and that in all of the circumstances, including circumstances particular to the applicant, conditions where an IFA exists are such that it would not be unreasonable for the applicant to seek refuge in that part of the country (see *Rasaratnam*, *supra*, at p. 711).

[6] In the case at bar, it is agreed there is no serious possibility of the applicant being persecuted in the proposed IFA of Bossaso. On the first point, the Board quoted Matt Bryden in his presentation to the Refugee Division in February 1996, where he stated that "the region is probably Somalia"s most secure region". However, the applicant maintains that in his particular circumstances, the conditions in Bossaso are such that it would be unreasonable for him to seek refuge there.

[7] Firstly, the applicant submits that the Board cannot conclude he will have safe access to Bossaso simply because it has an airport and port. However, it has been established that the onus is on the applicant to show that he is unable to reach the IFA without travelling through unsafe areas. The applicant adduced no such evidence.

[8] On the question of reasonableness, the Board had the following to say, at page 1 of its Reasons:

It is clear to the panel from hearing scores of Somali cases that, in Somalia today, it is one"s clan that is the *de facto* government and therefore the *de facto* agent of protection in the various regions controlled by one"s clan; it is the clan that is the social welfare agency in that region. It is true that the claimant is a young man but it is also true that Bossaso is controlled by his clan nd it is the panel"s finding that he would be able to find refuge and protection among his clan there. Here the panel notes that the claimant"s aunt, Fadumo, had inquiries made of her sister"s [the claimant"s mother] whereabouts and these inquiries were made in Bossaso. These inquiries were made because many Majertan from Kismayo had gone to Bossaso by boat after the fighting in Kismayo.

[9] The applicant submits that there is no evidence that the clan provides any social welfare in that region. The applicant quotes from the briefing paper for an IRB information session on Somalia, dated February 15, 1996, which stated that the clan "

... has little effective administrative control; its authority is mainly moral and military." The applicant does not disagree that the area is peaceful. However, the applicant goes on to point out that Matt Bryden stated that "health care, education, water development, etc., are minimal."

[10] The applicant further submits that the Board should have taken into account the following considerations as to whether an IFA is available for this specific claimant: (1) the applicant is a child; (2) he has never been to Bossaso; (3) he has no family members there to look after and protect him; (4) he has not lived anywhere in Somalia since the age of ten; (5) he has no means of supporting himself or earning an income; (6) he would have to live in dire poverty; and (7) he would have no access to schools, hospitals or other services. The evidence is that the applicant was 10 years old when he left Somalia and 16 years old at the time of the hearing before the Board. The evidence supports considerations 2, 3 and 4, and there is no evidence to the contrary. There are no findings by the Board with respect to considerations 5, 6 or 7, and the evidence relating thereto is contradictory. It was also submitted before the Board that the applicant would have no access to schools. There were no direct submissions on the rest of considerations 5, 6 and 7. Before the Board, counsel for the applicant submitted that "a child such as Mahamod with no family, no contacts and no money...would be in an extraordinarily difficult position," and that with regard to the reasonableness of the IFA, "the determinative point is the fact that Mahamod is a child."

[11] In *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, (1993) 22 Imm.L.R. (2d) 241, the Court of Appeal elaborated on the second step of the IFA analysis, stating at page 246, that "[t]his test is a flexible one, that takes into account the particular situation of the claimant and the particular country involved." Linden J.A., speaking for the Court, rearticulated the question as whether it would be "unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad." (at page 246) Linden J.A. continued that for an IFA to be considered reasonable, "[t]he claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there." (at page 246) He cited as examples of such undue hardship requiring claimants to cross battle lines where fighting is going on at great risk to them or requiring them to hide out in an isolated region of the country. However, it would not satisfy the test of "undue hardship" to show that a claimant would "have no friends or relatives there, or that [s/he] may not be able to find suitable work there." (at page 247)

[12] In the case at bar, the applicant raises a consideration not directly addressed by *Thirunavukkarasu, supra*: whether it is necessary to consider that the claimant is a child in deciding if an IFA would be reasonable. The respondent submits that in light of *Thirunavukkarasu, supra* the Board was not required to consider the absence of friends or family and concerns regarding livelihood.

[13] However, it is important to note that these considerations have only been deemed irrelevant by the Court of Appeal in the context of adult claimants. *Thirunavukkarasu, supra* also requires that the question of "undue hardship" be approached having regard to the *particular* claimant"s circumstances. What is merely inconvenient for an adult might well constitute "undue hardship" for a child,

particularly the absence of any friend or relation. Moreover, in the case of a child whose education has already been disrupted by war, and who would arrive in Bossaso without any money, there arises the question not simply of "suitable employment" but of a livelihood at all. The Board made no finding on these issues, and in my opinion, it must do so in order to answer the question posed by the second part of the IFA test.

[14] I note that the considerations cited in *Thirunavukkarasu, supra*"physical barriers to reaching the IFA and the need to hide once there"are examples of what might constitute "undue hardship" and as such do not preclude other factors being considered. Moreover, the hardship suffered by a child sent to an unfamiliar place, without the support of an adult and without the prospect of a livelihood is, in my view, commensurate with these cited examples of undue hardship.

[15] As the Board made no findings of fact on these issues, I cannot determine whether this particular applicant faces such unduly harsh circumstances in the proposed IFA of Bossaso. However, because the record discloses a possibility of undue hardship, it is necessary to address the issues arising from the applicant"s young age. Merely mentioning this factor, as the Board did, is not sufficient, unless the factors deemed irrelevant in *Thirunavukkarasu, supra,* are also irrelevant in the case of a child. In failing to assess the reasonableness of the IFA from the standpoint of this particular applicant, the Board committed an error of law.

[16] With respect to the second issue, applicant"s counsel submitted that the U.N. Convention on the Child provides the standard to be applied in this context. In my view, this Convention has not been incorporated into the *Immigration Act* as was the United Nations Convention Relating to the Status of Refugees, July 28, 1951, and the protocol thereto, January 31, 1967. This issue was decided in *Baker v. Canada (Minister of Citizenship and Immigration),* [1996] F.C.J. No. 1570, November 29, 1996, in which the Court of Appeal held that the U.N. Convention on the Child had not been implemented by the *Immigration Act.* If the Convention rights were used as a yardstick, it could create legitimate expectations for child refugee applicants which would generate a result contrary to *Baker, supra*.

[17] As to the third issue, in my view, the Board did not err in relying on its specialized knowledge when it concluded, based on its experience "from hearing scores of Somali cases", that the clan which controls an area functions as the de facto government agent of protection in this area. In my view, the evidence supports this conclusion. Furthermore, the Board gave notice as required in s. 68(5). I note that in *Galindo v. M.C.I.* [1981], 2 F.C. 781 at 782, Urie J. specified the type of notice required in such instances:

... If the kind of information used in this case, which appears to be of a type which an applicant might well be in a position to contest, is to be relied upon by the Board in a hearing pursuant to subsection 71(2) of the *Immigration Act, 1976,* S.C. 1976-77, v. 52, natural justice requires that the applicant be entitled to respond to it just as he would to evidence adduced at the hearing.

The Board stated during the hearing that it was relying on its specialized knowledge that clan members traditionally look after one another. Counsel for the applicant

addressed this issue in his final submissions before the Board. Thus, the notice requirement of s. 68(5) has been met by the Board.

[18] For the reasons set out in paragraphs 8 - 15, the application for judicial review is allowed and the decision of the Board dated January 27, 1998, is set aside. The matter is sent back to the Board for rehearing and redetermination by a differently constituted Board in a manner not inconsistent with these reasons.

[19] I was asked to certify the following two related questions:

Is the legal test of the reasonableness of an IFA the same for adults and children insofar as the absence of family and friends and the inability to support oneself in the proposed IFA are not relevant considerations? If so, in assessing the reasonableness of an IFA for children, does the age of the child have any bearing on the test?

Since, in my view, these are serious questions of general public importance, I certify and state them.

William P. McKeown

JUDGE

OTTAWA, Ontario

March 12, 1999