

Kombo v. Canada (Minister of Citizenship and Immigration)

Between
Muhammad Ali Kombo, applicant, and
The Minister of Citizenship and Immigration, respondent

[2001] F.C.J. No. 697
2001 FCT 439
Court File No. IMM-4181-00

**Federal Court of Canada - Trial Division
Toronto, Ontario
McKeown J.**

Heard: April 26, 2001.
Judgment: May 7, 2001.
(14 paras.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Credible basis for claim — Refugee Division, duties of — Evidence — Appeals and judicial review, whether claim reasonable.

Application by Kombo for judicial review of a decision of the Convention Refugee Determination Division that Kombo was not a Convention refugee. Kombo was a citizen of Somalia who had been residing in Kenya for 11 years prior to his arrival in Canada. He claimed an inability to obtain citizenship in Kenya because of his Somalian citizenship. He claimed that he feared persecution in Somalia were he to be returned. The Board concluded that Kombo was not a credible or trustworthy witness and gave five reasons for that conclusion. The Board did not believe his account of the alleged persecution and concluded that Kombo may have come to Canada to seek medical attention. Kombo argued that notwithstanding the Board's findings on credibility, the Board erred in failing to decide whether or not he had a well-founded fear of persecution in Somalia, his country of origin.

HELD: Application dismissed. The Board's findings with respect to Kombo's credibility were central to his claim. Since the Board found that Kombo was not credible, he had not met the subjective element of the well-founded fear test. Therefore, the Board was not obligated to consider and make a finding regarding the issue of Kombo's objective fear in Somalia. The Board made no perverse or capricious findings of fact.

Counsel:

Michael Brodzky, for the applicant.
Negar Hashemi, for the respondent.

1 **McKEOWN J.** (Reasons for Order):— The applicant seeks judicial review of a July 11, 2000 decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (the "Board") wherein the Board found that the applicant was not a Convention Refugee. The Board was "not persuaded on a balance of probabilities that the claimant has established a well-founded fear of persecution by reason of any of the enumerated grounds."

2 The issues are:

- 1) Did the Board err and lose jurisdiction by failing to make a finding regarding the applicant's race (Bajuni) and failing to decide whether or not the applicant has a well-founded fear of persecution in his country of nationality (Somalia)?
- 2) Did the Board make perverse and capricious findings of fact, specifically with regard to the applicant's failure to explain the absence of Mr. Awad as a key identity witness, the failure of the medical evidence to establish that the applicant's present disability was caused by torture he suffered in Somalia in 1987, and the applicant's failure to demonstrate that he could not obtain surrogate protection in Kenya?

3 The applicant is a fifty year old male citizen of Somalia who resided in Kenya for the eleven years prior to his arrival in Canada. He married a Kenyan citizen and had two Kenyan children. He claims to have been unable to obtain legal status in Kenya and to have lived in fear of harassment by the authorities and deportation to Somalia. He testified that his illegal status put him at the mercy of government officials to whom he paid bribes on threat of deportation.

4 The applicant's counsel submits that once the Board determined that the applicant was a citizen of Somalia, it was incumbent on the Board to decide the central question before it, i.e. whether or not the applicant has a well-founded fear of persecution in Somalia and whether or not the applicant's race or ethnic identity was Bajuni.

5 The Board set out this position in the first paragraph of its reasons:

Muhammad Ali Kombo, age 50, bases his claim to be a Convention refugee on his identity as a long-time resident of Kenya who is unable to obtain status in that country because of his Somali citizenship. He fears persecution in, and deportation from, Kenya, at the hands of government authorities. As a member of the minority Bajuni clan and because of his

perceived political opinion, he fears persecution, including death, in Somalia at the hands of armed majority clans, from which no state protection is open to him.

The Board stated at page 2 that it:

determines Muhammad Ali Kombo not to be a Convention refugee because the panel hearing his claim did not believe his account of the events leading to his claim.

The Board went on to give five reasons for its view that the applicant was not credible. The Board stated again, at page 3:

We found the claimant not to be a credible or trustworthy witness and concluded that we could not rely on his unsupported testimony for the following reasons.

I am satisfied on the material before the Board that it was open to the Board to make these findings.

6 The Board concluded at page 7:

We are not satisfied, based on the evidence he has provided that that [sic] his reasons for leaving Kenya were for the purpose of seeking international protection. We do not believe the claimant's account of the events leading to his claim. In light of the evidence before us, we are unable to rule out the possibility that he left Kenya to seek medical attention in Canada.

After careful consideration of all the evidence and for the reasons set out above, we are not persuaded on a balance of probabilities that the claimant has established a well-founded fear of persecution by reason of any of the enumerated grounds.

7 The applicant submits that, notwithstanding the Board's findings on credibility, the credibility findings were not central to the claim and that the Board should have reviewed the objective evidence regarding Somalia. I do not agree that the Board's findings were not central to its claim. The applicant has spent eleven years in Kenya and had a family there to look after him. However, as stated in *Ward v. M.E.I.*, [1993] 2 S.C.R. 689 (S.C.C.), the applicant must show both a subjective fear of persecution and this fear must be well-founded in an objective sense. As *La Forest J.* stated at paragraph 64 of *Ward*, *supra*:

This test was articulated and applied by *Heald J.A.* in *Rajudeen*, *supra* at p.

134:

The subjective component relates to the existence of the fear of persecution in the mind of the refugee. The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear.

In the Ward case, the Board had found that the applicant was a credible witness, so that the only live issue remaining concerned the applicant's objective fear.

8 The Board was entitled to rely on its credibility findings, as per the decisions in *Yassine v. Canada (M.E.I.)*, [1994] F.C.J. No. 949 (C.A.) and *Mathiyabaranam v. Canada (M.C.I.)*, [1997] F.C.J. No. 1676 (C.A.).

9 Therefore, since the Board found that the applicant was not credible, the applicant did not meet the subjective element of the well-founded fear test. Therefore, the Board was not obligated to consider the documented facts surrounding the situation of the Bajuni people in Somalia and made a finding regarding the issue of objective fear.

10 The applicant suggested that the Board had made perverse and capricious findings of fact with respect to three different matters. Firstly, the applicant's failure to explain the absence of Mr. Awad as a key identity witness. The applicant was asked by way of the Board's screening form, to have Mr. Awad as an identity witness at the hearing. Mr. Awad did not appear and the Board is entitled to infer from his absence that his evidence would not have been helpful on the several points with regard to which he was to give evidence. After receiving the request by way of the screening form, the onus was on the applicant to explain the absence of Mr. Awad.

11 Secondly, in my view, it was open to the Board to make the finding that the applicant had not arrived in Kenya with spinal injuries as he had claimed. None of the medical reports could determine the cause of his medical injuries. It was up to the applicant to show, on a balance of probabilities, that he had suffered those injuries prior to his arrival in Kenya. I also note that the Board extensively reviewed the medical evidence before it at page 5 of its reasons.

12 Thirdly, the Board did not err when it stated that the applicant failed to demonstrate that he could not obtain surrogate protection in Kenya. The Board's findings were quite detailed in this respect. At page 6 it stated:

Given the documentary evidence that Kenyan citizenship and residence not to be [sic] open to foreign-born males by virtue of marriage to a Kenyan woman, we accept that, even with his marriage, the claimant had no such entitlement. We accept that, from time to time, Kenyan officials crack down on Somali citizens in Kenya illegally. Yet the claimant took no

action to secure international protection, even after he had been picked up and threatened with deportation if he did not pay a bribe. He claimed that, during that time, he was unable to register as a refugee at a refugee camp because of the limitations posed by his motor deficits. His testimony was that he didn't think of registering with UNHCR in Mombassa. We find this not to be plausible if he had no status in Kenya and was continually faced with the possibility of deportation. We do not find reasonable his explanation that he shied away from registering for fear of drawing the attention of authorities. He cannot have it both ways. Either he was arrested and detained because he was a Somali citizen with no legal status, in which case he had already come to the attention of authorities or, during eleven years he had found another way out and he faced no particular danger. We are not satisfied that residency status in Kenya was unavailable to him.

13 In my view, the Board is stating in the last sentence above that, although residency status was not open to the applicant by virtue of marriage to a Kenyan woman, there were other possible ways that he may have had to obtain some form of residency status. I note that the Board also said that during the eleven years that the applicant was in Kenya, he faced no particular danger. Thus, it was open to the Board to find that he had failed to demonstrate that he could not obtain surrogate protection in Kenya.

14 The application for judicial review is dismissed.

McKEOWN J.