

Date: 20020815

Docket: IMM-4080-01

Neutral citation: 2002 FCT 864

Vancouver, British Columbia, Thursday the 15th day of August 2002

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

ABDUL SALAAM **SALIM**

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

DAWSON J.

[1] Mr. **Salim** is a citizen of Tanzania, born in Zanzibar, who claims to be a Convention refugee on the basis of his political opinion. He brings this application for judicial review from the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board ("CRDD") that he is not a Convention refugee.

BACKGROUND

[2] Mr. **Salim**'s claim, in summary form, is as follows. In March of 1993, Mr. **Salim** joined the opposition party Civic United Front ("CUF") as a recruiter, fundraiser and party organizer. Three months after he joined CUF he was fired from his office job at Air Zanzibar because of his CUF activism. In 1996 after an electric transformer explosion he was arrested, taken outside of the city, and detained along with other CUF supporters. Mr. **Salim** believes that the ruling Chama Cha Mapinduzi party ("CCM") used this explosion as a pretext to arrest opposition activists. During his detention Mr. **Salim** was punched and kicked by masked men, forced to sleep on the floor with other detainees, and given substandard food, sometimes infested with worms. After one week he was transferred to Kilimani prison, where he continued to be interrogated, and was released after a total of two weeks in detention.

[3] One month later, Mr. **Salim** was re-arrested as a result of speaking out about his detention. He was taken to the Kilimani prison again, shoved and harassed but not seriously beaten.

[4] Because of the unsanitary prison conditions, he developed a malaria infection and stomach pains. He was taken to the hospital for treatment and then released home.

[5] After this incident, Mr. **Salim** began to fear for his life, fearing that being arrested again might mean getting sick and dying in prison. Mr. **Salim** continued his membership in CUF, but stopped being openly active with the CUF which enabled him to avoid problems for some time.

[6] Mr. **Salim** found a job with a private company at the airport, but was laid-off after two years because, he believes, of CCM pressure on the company to dismiss CUF supporters. Mr. **Salim** was fired from his next job after 22 days for what he believes were similar reasons. He was fired from his next job after six months because his co-worker was a CCM supporter.

[7] In 1996, Mr. Salim left Zanzibar for Dar Es Salaam, which is located on the mainland, and he was followed there later by his wife and children. He then moved inland to a small town and stopped going to Dar Es Salaam when he learned a CUF member was arrested there. Mr. Salim stayed in contact with the CUF and contributed money to it while on the mainland. In 1999, his brother in Zanzibar was interrogated and questioned about Mr. Salim, and his brother was told that this would continue until Mr. Salim left the country.

[8] With the help of an agent, in September 1999 Mr. Salim fled Tanzania and came to Canada, leaving his wife and children behind. Before the CRDD Mr. Salim stated that he continued to be an active member of the CUF while in Canada and had joined the Zanzibar Human Rights Group in Canada which supports the CUF. Mr. Salim has participated in demonstrations in Toronto at Queen's Park and at the Tanzanian High Commission in Ottawa. Mr. Salim says that he fears being detained and tortured if returned to Tanzania because of his activism there and in Canada.

THE DECISION OF THE CRDD

[9] The central passages of the reasons of the CRDD are as follows:

[...] the panel notes that the claimant had not been active in Zanzibar CUF activities since his move to the mainland in 1996. The panel disbelieves that the Zanzibar authorities would seek to arrest the claimant by reason of CUF activities engaged in in [sic] Zanzibar three years previous to September 1999. Further, the Tanzanian authorities released the claimant in 1996 without any terms and conditions. In addition, the claimant testified that the police showed no interest in him from 1996 up to the time of his departure from Tanzania.

The claimant supplied in evidence a letter issued by the Civic United Front headquarters describing the claimant's contributions to the organisation and stating that he was arrested by the Tanzanian government in 1996 and detained by reason of his CUF activities. Mr. Abdul Fattah Hassan Aboud provided *viva voce* testimony that he was a representative of the organisation the "Zanzibar Human Rights Group". He testified regarding the claimant's activities on behalf of the Civic United Front (CUF) since his arrival in Canada. Mr. Aboud provided testimony to the effect that the claimant had attended four CUF demonstrations, including one at Queen's Park in Toronto and three demonstrations in Ottawa, one of which was staged outside the Tanzanian High Commission. The witness stated that he was of the opinion that the claimant would be at risk of further detention by the Tanzanian authorities should he return to his country of citizenship.

A claimant may be a Convention refugee as a consequence of events which have occurred in his country since departure or as a result of activities of the claimant since leaving his country. The focal question for the decision-maker with respect to *sur place* claims is whether the actions of the claimant have come to the attention of the authorities in the claimant's country of citizenship. An expert's evidence is intended to provide decision-makers with information which is outside their experience or knowledge. The evidence of an expert witness is useful only if that witness, because of his or her expertise, is in a better position than the decision-maker to form an opinion or draw inferences from the facts. The qualifications of a witness do affect the weight to be given to his or her evidence.

The panel was not provided with corroborative evidence with respect to the existence of a registered Zanzibar Human Rights group in Toronto, Canada, or with regard to the witness' association with the organisation. The panel was not provided with any documentation describing Mr. Abdul Fattah Hassan Aboud's qualifications to present expert testimony as to the assessment of risk to the claimant by his potential return to Tanzania following his participation in demonstrations in Canada. The panel was not provided with any documentation corroborating the witness' qualifications to comment authoritatively on the human rights conditions in Tanzania and its treatment of CUF members. The witness stated that the demonstrations were reported in the media in Canada as well as Tanzania but the panel did not receive any newspaper articles with respect to the demonstrations. What was presented to the panel were photographs from a demonstration showing the claimant displaying a placard demanding observance of human rights standards in Zanzibar. The photographs presented had been taken by observers and participants at the demonstration and not by the media.

The witness Mr. Aboud described that an ambassador at the Tanzanian High Commission in Ottawa confirmed that he had reported the occurrence of the demonstration to the government in Tanzania. The witness speculated that because the claimant had been present at a demonstration of approximately 70 to 80 people outside the High Commission in Ottawa, he would likely be arrested upon return to Tanzania. The panel does not find Mr. Aboud to be an expert witness and it accords little if any weight to the witness' evidence with respect to the assessment of risk to the claimant should he return to Tanzania given that his evidence is based on conjecture or speculation as to the knowledge of the Tanzanian government regarding the claimant's participation in demonstrations in Canada and more importantly, the witness was speculating about the reaction of the Tanzanian government respecting participation in a demonstration in Canada on Zanzibari-Tanzanian human rights.

The panel finds that the claimant, who had no significant role in the demonstrations in Canada, has not come to the attention of the Tanzanian authorities. However, even if the claimant's participation in demonstrations in Canada were to come to the attention of the Tanzanian authorities, this is not a significantly different situation from the claimant's experience in mainland Tanzania where he was able to carry on a business without problems from the state authorities despite his continued involvement with the CUF. The claimant described in his *viva voce* testimony that he continued his support and membership with the CUF on the mainland and that he attended CUF meetings. Nevertheless, according to the claimant's evidence he was not questioned or arrested by the police by reason of his CUF involvement on mainland Tanzania. [footnotes omitted]

THE ISSUES

[10] Four issues are raised with respect to the CRDD's decision:

1. Did the CRDD violate natural justice by failing to advise Mr. **Salim** of its concerns relating to the supporting witness, Mr. Aboud?
2. Did the CRDD err in law by inventing criteria for believing testimony, which criteria are perverse and have no basis in law?
3. Did the CRDD err in law by making findings which are self-contradictory and therefore capricious?
4. Did the CRDD err in law by making its decision without regard to any evidence of the current situation in Tanzania?

ANALYSIS

[11] The first two issues are subsumed under the following heading.

(a) Did the CRDD err in its treatment of the evidence of the supporting witness?

[12] On Mr. **Salim**'s behalf it is asserted that the CRDD erred by failing to warn him that it would require his supporting witness to be qualified as an expert, erred in imposing such a requirement because the witness was testifying as to things within his knowledge, erred by failing to confront the witness or Mr. **Salim** with its doubts before issuing its reasons, and erred by importing a requirement that the witness provide proof of the existence of the human rights group he was a member of, news articles describing the protests, documentation proving the witness could authoritatively comment on the situation in Tanzania and media photos.

[13] Subsection 68(3) of the *Immigration Act*, R.S.C. 1985, c. I-2 ("Act") provided that:

68(3) The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

68(3) La section du statut n'est pas liée par les règles légales ou techniques de présentation de la preuve. Elle peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.

[14] In view of this provision it was an error for the CRDD to reject evidence on the ground the witness must necessarily be qualified as an expert before his or her opinion could be received in evidence.

[15] In *Fajardo v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 392 (F.C.A.) the Court of Appeal stated that it was wrong for the CRDD to discount affidavit evidence because the deponent could not be cross-

examined. The Court, at paragraph 4 of its reasons, wrote that it "is not for the Refugee Division to impose on itself or claimants evidentiary fetters of which Parliament has freed them".

[16] However, in the present case the CRDD did not reject all of the evidence of Mr. Aboud. What the CRDD accorded little or no weight to was his evidence "with respect to the assessment of risk to [Mr. Salim] should he return to Tanzania". While the CRDD did state that it did not find Mr. Aboud to be an expert because the panel was not provided with documentation describing his qualifications to present such opinion (and indeed Mr. Aboud was not tendered as an expert) the CRDD's expressed reason for rejecting such testimony was "that [Mr. Aboud's] evidence is based on conjecture or speculation as to the knowledge of the Tanzanian government regarding the claimant's participation in demonstrations in Canada and more importantly, the witness was speculating about the reaction of the Tanzanian government respecting participation in a demonstration in Canada on Zanzibari-Tanzanian human rights".

[17] Given that the CRDD did not rely on the fact that it did not find Mr. Aboud to be an expert so as to reject all of his evidence, and that Mr. Aboud's opinion as to the future risk to Mr. Salim was rejected because it was found to be based upon conjecture or speculation, I cannot find that the CRDD committed a reviewable error by giving little or no weight to Mr. Aboud's opinion. It is always for the CRDD to weigh evidence to determine if it is credible or trustworthy. The weight given to Mr. Aboud's evidence was made with regard to the evidence and cannot therefore be characterized as being perverse or capricious.

[18] As to the failure of the CRDD to confront Mr. Aboud with its doubts with respect to his testimony, it has been held that it is a breach of the duty of fairness to fail to inform a refugee claimant of a key issue. For example, the CRDD is obliged to warn a claimant if the issue of an internal flight alternative is to be raised. See, *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.). Similarly, the CRDD has been held to be obliged to afford to a claimant the opportunity to explain significant inconsistencies between his or her evidence and documentary evidence. These requirements reflect that the duty of fairness requires an opportunity to participate in the hearing before the CRDD in a meaningful way.

[19] However, the duty of fairness is contextual and a refugee claimant has no right to receive notice about the possibility of the finding of no credible basis. See, *Mathiyabaranam v. Canada (Minister of Citizenship and Immigration)* (1997), 156 D.L.R. (4th) 301. In *Mathiyabaranam*, the Court of Appeal explained these different results as follows at paragraphs 10 and 11 of its reasons:

Any claimant is aware or should be aware of the risk of a no credible basis finding even without any additional notice being given about this potential outcome. A refugee claimant must realize that he or she must establish, as part of his or her claim, a credible basis for his or her claim. You cannot establish a claim for refugee status without first establishing a credible basis for that claim; the one is totally dependant upon and included in the other. I cannot imagine what a claimant, if given special notice, could possibly add to his or her case. All of the available evidence should already have been placed before the Board as part of the claim for refugee status.

I am not persuaded that the issue of a credible basis finding is analogous to the issue of IFA, for which notice has been held to be required. The existence of an internal flight alternative is considered separate from the question of a well-founded fear of persecution (which is central to the definition of Convention refugee [See Note 10 below]). One might establish a well-founded fear of persecution in one part of a country and still be denied status because of an internal flight alternative. Answering the questions normally posed by the Convention refugee definition does not dispose of this particular and separate matter if it becomes relevant during the proceedings. Hence, some form of notice is required to meet the demands of natural justice. However, a credible basis determination is inherent in the definition of Convention refugee. It does not place upon the claimant an evidentiary burden separate from or additional to the primary one imposed by the definition itself. The other issues requiring additional notice are likewise different than the credible basis issue.

Note 10: Immigration Act, R.S.C. 1985, c. I-2, ss. 2(1).

[20] It can therefore be seen that a duty to give notice arises pursuant to principles of natural justice or procedural fairness when an evidentiary burden not inherent in the definition of Convention refugee arises, and notice is required in order to provide an opportunity to participate in the hearing in a meaningful way.

[21] Returning to the present case, the CRDD found Mr. Aboud's opinion of the prospective risk to Mr. Salim to have little or no probative value because it was speculative. It followed from that finding that the evidence was speculative that Mr. Salim was found not to have met his evidentiary burden to satisfy the CRDD of the existence of his well-founded fear of persecution. In that circumstance, I find no duty on the part of the CRDD to advise Mr. Salim during the course of the hearing that it found the evidence of Mr. Aboud to be non-persuasive. Having produced Mr. Aboud as a witness provided a meaningful opportunity to persuade the CRDD of the existence of risk. There was no obligation on the part of the CRDD to give notice during the hearing that it did not find the evidence to be persuasive.

[22] Finally, I have not been satisfied that the CRDD invented criteria for believing testimony. In looking at things such as the existence of a registered human rights group and Mr. Aboud's qualifications to opine as to the likelihood of risk, the CRDD was looking for factors that established a factual basis for the witness' prognostication of future events. This is part of the mandate of the CRDD to assess the cogency of evidence. Similarly, the CRDD was entitled to consider the absence of media articles and photographs when considering whether Mr. Salim has come to the attention of the authorities. The CRDD did not put the absence of media reports to Mr. Aboud when he gave his evidence.

(b) Did the CRDD make findings which are self-contradictory and therefore capricious?

[23] On Mr. Salim's behalf it is argued that the CRDD's finding that he was politically active in Tanzania from 1996 to 1999 and therefore would not likely suffer any reprisals ignored Mr. Salim's testimony that his activism in Dar Es Salaam on the mainland was not done openly. It is further argued that two pages earlier in its reasons, the CRDD contradicted itself, finding that Mr. Salim was not politically active from 1996 to 1999.

[24] Mr. Salim's testimony was that while he lived on the island of Zanzibar he openly supported the CUF as a recruiter, fundraiser and organizer. However, once he moved onto the mainland he was not very involved with CUF and would only go to its meetings and donate money to it. While on the mainland the police, according to Mr. Salim, knew that he was a member of the CUF.

[25] This evidence supports the conclusion of the panel that while on the mainland Mr. Salim was able to carry on his business and was not questioned or arrested despite his continued involvement as a supporter and member of the CUF.

[26] Earlier in its reasons, the CRDD did refer to Mr. Salim as not being active in Zanzibar CUF activities after his move to the mainland in 1996. I do not, however, find this to be a contradiction. Rather, I find that the CRDD was drawing a distinction between Mr. Salim's CUF activities on Zanzibar (where he was an active participant until 1996) and his more passive membership and financial support of CUF post-1996 which was not on or related to Zanzibar, but which was on the mainland.

(c) Did the CRDD ignore the evidence of the current situation in Tanzania?

[27] On Mr. Salim's behalf it is argued that the documentary evidence shows that in late 2000, following a failed election, there were major and widespread detentions of CUF activists. Over 1,000 CUF members fled from the islands of Zanzibar and Pemba to Kenya and were declared to qualify for refugee status by the United Nations High Commissioner for Refugees. It is said on Mr. Salim's behalf that the documentary evidence relied upon by the CRDD does not support its finding that Mr. Salim's membership in the CUF and his protest activity would be of no consequence today. In addition to the evidence of crackdowns against CUF supporters in Zanzibar, the documentary evidence was, it was said, to the effect that after 1999 CUF activists were targeted on the mainland as well.

[28] It is well-settled that the CRDD is not obliged to mention in its reasons all of the documentary evidence, but the CRDD has an obligation to consider all of the directly relevant documentary evidence. The greater the relevance of the

documentary evidence, the greater the need for the CRDD to explain in its reasons why no weight was attributed to that evidence. See, *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (T.D.). The Court will not lightly interfere with the weight assigned to evidence by the CRDD.

[29] In the present case, it is asserted that the CRDD ignored the following evidence:

· An October 18, 1999 Amnesty International response to Mr. Boulakia's request for information regarding the treatment of members of the Civic United Front in Tanzania states as follows:

[...] on 16 September, 1999 Zanzibar's Attorney General issued arrest warrants on treason charges for ten members of CUF, who if arrested would join in prison in Zanzibar 18 other CUF members. (AI Index: AFR 56/04/99; UA 244/99). This new development poses a threat to CUF activists in Tanzania and abroad - the Attorney General had earlier alleged exiles were involved in the plot to violently overthrow Zanzibar's President Salim Armour. Amnesty International is of the view that these charges have been fabricated. [underlining added]

· A January 30, 2001 Amnesty International report says:

"The excessive force used by the Tanzanian police over the last four days in Zanzibar and Dar es Salaam in an attempt to prevent freedom of assembly is appalling," Amnesty International said today.

At least 37 people have reportedly been killed, including six police officers, and an unknown number injured when police used gas and live bullets to break-up demonstrations on the islands of Unguja and Pemba, Zanzibar, and in Dar es Salaam, organized by the opposition Civic United Front (CUF).

· An IRB Research Directorate document dated February 23, 2001 says:

According to Amnesty International, violence in which at least 37 died was reported in the islands of Unguja and Pemba, Zanzibar and Dar-es-Salaam during the CUF-organized demonstrations (30 Jan. 2001). According to Amnesty,

On Thursday 25 January, the CUF chairman and member of Parliament for Kigamboni, Professor Ibrahim Lipumba, was arrested violently by the police in Dar-es-Salaam with at least 50 others and charged with unlawful assembly. He remained in prison over the weekend as his bail was set very high... [underlining added]

The remainder of evidence cited by the applicant does not speak of anti-CUF incidents on the mainland.

[30] Here the weight and cogency of the evidence not referred to by the CRDD in its reasons does not, in my view, support an inference that such evidence was ignored, and is not such as to warrant interference by the Court.

CONCLUSION

[31] Therefore, notwithstanding the very able submissions of counsel for Mr. Salim, the application for judicial review will be dismissed. Neither counsel posed a question for certification, and no question is certified.

ORDER

[32] **IT IS HEREBY ORDERED THAT:**

1. The application for judicial review is dismissed.
2. No question is certified.

(Sgd.) "Eleanor R. Dawson"

Judge

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: IMM-4080-01

STYLE OF CAUSE: Abdul Salaam **Salim** v. M.C.I.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 23, 2002

REASONS FOR ORDER AND ORDER

OF THE HONOURABLE MADAM JUSTICE DAWSON

DATED: August 15, 2002

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