

Federal Court



Cour fédérale

**Date: 20201211**

**Docket: IMM-3925-19**

**Citation: 2020 FC 1145**

**Ottawa, Ontario, December 11, 2020**

**PRESENT: Mr. Justice McHaffie**

**BETWEEN:**

**AMMAR AHMED ABUGIBBA MOHAMED**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Ammar Mohamed claims he was detained and beaten by the National Intelligence and Security Service (NISS) in Sudan because he was identifiable as someone who had grown up outside Sudan. He says he was not released until his cousin's husband intervened, and until he undertook to remain in Sudan and to complete his national military service when he turned 18.

[2] Mr. Mohamed's claim for refugee protection in Canada was rejected on grounds of credibility. Noting the absence of corroborative documents, the Refugee Protection Division (RPD) found Mr. Mohamed not credible, because he could not name the officer who had beaten him, lacked knowledge on Sudanese military service obligations, and had failed to seek refugee protection in the United States. The Refugee Appeal Division (RAD) refused Mr. Mohamed's request to file additional documents on appeal, rejecting his argument that his former counsel had given inadequate advice about the evidence he should present to the RPD. It also upheld the RPD's credibility findings.

[3] Mr. Mohamed seeks judicial review of the RAD's decision. He argues it was unfair for the RAD to refuse his request to file new documents on credibility grounds without an oral hearing. He also argues that both the refusal of the new documents and the dismissal of his appeal on the merits were unreasonable.

[4] I conclude the RAD was not required to hold an oral hearing before refusing Mr. Mohamed's request to file new documents on appeal. However, I find the RAD's refusal to admit the new documents was unreasonable, as it failed to show that the RAD took the evidentiary record and Mr. Mohamed's submissions meaningfully into account, and unduly focused on the experience of Mr. Mohamed's former counsel. I also conclude the RAD's dismissal of the appeal on the merits was unreasonable, given its error in the identification and application of the relevant standard of review, and its wholesale dismissal of corroborative evidence on the basis of an adverse credibility finding.

[5] The application for judicial review is therefore allowed and the matter remitted to the RAD for redetermination.

II. Issues and Standards of Review

[6] Mr. Mohamed raises a number of challenges to the RAD's decision. I do not need to address some of these, including his argument that the RAD failed to adequately assess section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Rather, I will focus on the following determinative issues:

A. Did the RAD err in refusing to admit the evidence Mr. Mohamed put forward on the appeal pursuant to subsection 110(4) of the *IRPA*, and in particular:

- (1) Was it unfair for the RAD not to conduct an oral hearing before making determinations regarding Mr. Mohamed's allegations against his former counsel?
- (2) Was the RAD's rejection of the evidence unreasonable?

B. Did the RAD err in upholding the RPD's adverse credibility findings, and in particular:

- (1) Did the RAD err in its review of the RPD's credibility determinations arising from Mr. Mohamed's testimony?
- (2) Did the RAD err in its treatment of the documentary evidence?

[7] With the exception of issue A(1), pertaining to the holding of an oral hearing, each of these issues goes to the merits of the RAD's determinations. The parties agree that these issues are reviewable on the reasonableness standard: *Canada (Minister of Citizenship and*

*Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh (2016)*] at paras 29, 74; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35.

[8] Reasonableness review starts with the principle of judicial restraint and respect for the distinct role of administrative decision makers: *Vavilov* at para 13. When conducting reasonableness review, the Court does not conduct a *de novo* analysis or attempt to decide the issue itself: *Vavilov* at para 83. Rather, it starts with the reasons of the administrative decision maker and assesses whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision: *Vavilov* at paras 81, 83, 87, 99. A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting “an internally coherent and rational chain of analysis” when read as a whole and taking into account the administrative setting, the record before the decision maker, and the submissions of the parties: *Vavilov* at paras 81, 85, 91, 94–96, 99, 127–128.

[9] Issue A(1) is a question of procedural fairness. On such issues, the Court assesses whether the procedure was fair having regard to all the circumstances: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The issue arises in the context of section 110 of the *IRPA*, and in particular subsections 110(4) and 110(6). The RAD’s interpretation and application of those provisions is generally subject to review on the reasonableness standard: *Singh (2016)* at paras 29, 74. However, the particular issue raised in this matter is whether the process followed by the RAD in making its determination under subsection 110(4) was procedurally fair.

Although this engages review of the relevant provisions, it remains a question of procedural fairness: see, *e.g.*, *Canadian Pacific* at paras 34–36, 81–92 (interpretation of a statutory duty to make a decision within a fixed time period is a matter of procedural fairness); and *Mission Institution v Khela*, 2014 SCC 24 at paras 79–85 (interpretation and application of a statutory procedural right to disclosure is a matter of procedural fairness).

### III. Analysis

#### A. *The RAD erred in rejecting Mr. Mohamed’s additional evidence*

- (1) It was not unfair to make a determination under subsection 110(4) without conducting an oral hearing

[10] Section 110 of the *IRPA* governs appeals of RPD decisions to the RAD.

Subsection 110(3) sets out a general rule that the RAD “must proceed without a hearing, on the basis of the record of the proceedings of the [RPD].” While the RAD may accept documentary evidence, subsection 110(4) limits the circumstances in which a claimant may present evidence:

#### **Evidence that may be presented**

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[Emphasis added.]

#### **Éléments de preuve admissibles**

(4) Dans le cadre de l’appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n’étaient alors pas normalement accessibles ou, s’ils l’étaient, qu’elle n’aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[Je souligne.]

[11] For new evidence to be admitted before the RAD, it must meet both the express statutory requirements of subsection 110(4) and the “*Raza* factors” of credibility, relevance, and materiality: *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 13–15; *Singh (2016)* at paras 38–49.

[12] The general rule that the RAD must proceed without a hearing is subject to subsection 110(6), which provides for an oral hearing if there is central and determinative documentary evidence filed that raises a serious issue with respect to the credibility of the claimant:

### Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

[Emphasis added.]

### Audience

(6) La section peut tenir une audience si elle estime qu’il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) sont essentiels pour la prise de la décision relative à la demande d’asile;

c) à supposer qu’ils soient admis, justifieraient que la demande d’asile soit accordée ou refusée, selon le cas.

[Je souligne.]

[13] While the RAD retains some discretion, a hearing must generally be held where these statutory requirements are met: *Zhuo v Canada (Citizenship and Immigration)*, 2015 FC 911 at paras 9–11.

[14] On his appeal to the RAD, Mr. Mohamed sought to file a number of new pieces of documentary evidence. This included statements from his mother and from his aunt's son-in-law (the husband of his cousin, who I will refer to as Mr. S), and a new translation of a previously-filed letter from his father. It also included dental records from Saudi Arabia, a psychological evaluation, and a variety of country condition evidence. As Mr. Mohamed's counsel points out, the sworn statement from Mr. S was of particular significance as it provided direct first-hand evidence related to Mr. Mohamed's disappearance, the efforts made to secure his release, and his condition upon release.

[15] All of this evidence arose prior, or pertained to events prior, to the rejection of Mr. Mohamed's claim. Mr. Mohamed argued that the evidence was not "reasonably available," or that he "could not reasonably have been expected in the circumstances to have presented" the evidence because the lawyer who represented him before the RPD did not provide adequate advice about the evidence he should obtain in advance of the hearing. Mr. Mohamed swore an affidavit stating that his former counsel told him to get letters from his father and his aunt, but did not give him instructions as to what aspects of his Basis of Claim (BOC) narrative those letters should address or in what degree of detail. He also stated that former counsel did not speak to him about the content of the letters once they were prepared, and did not ask if anyone else could corroborate details of the detention that was central to the claim, such as Mr. S.

[16] In accordance with the *Practice Notice—Allegations Against Former Counsel* issued by the Immigration and Refugee Board (IRB), Mr. Mohamed’s new counsel before the RAD (who was not the counsel that argued this application), gave notice to his former counsel of the allegations of inadequate advice. This notice resulted in a back-and-forth of allegations between Mr. Mohamed and his former counsel in which they each put forward different versions and characterizations of events. Further details regarding this exchange are set out below.

[17] The RAD concluded that Mr. Mohamed had not met his burden for admitting the new evidence. Part of that determination was that the RAD did not accept Mr. Mohamed’s argument that his counsel failed to provide adequate advice. The RAD’s reasons for that conclusion read as follows:

The RAD does not find persuasive the appellant’s argument that his counsel (before the RPD and RAD) failed to provide him clear instructions on the need to provide documentary evidence. In this regard, [former counsel] has provided detailed notes and dates, as well as a copy of written instructions, to the RAD outlining his direct interactions with the appellant. The RAD furthermore notes counsel is very experienced regularly appearing before the Board. The RAD gives greater weight to counsel’s detailed notes as compared to the appellant’s inconsistent and evolving allegations against counsel.

[18] Mr. Mohamed argues that this finding amounts to an adverse credibility finding with respect to his explanation for not obtaining the evidence, and that the RAD ought to have afforded him an oral hearing before making such a finding. I agree that the RAD’s finding is one going to Mr. Mohamed’s credibility. While the Minister argued that the RAD was simply assessing whether Mr. Mohamed had met his burden, I cannot accept that the conclusion to effectively accept counsel’s version of events over that of Mr. Mohamed is simply one of



meeting an onus. This is particularly so in the context of the evidence, which offered incompatible versions of events, and in light of counsel's allegations, which included numerous statements that Mr. Mohamed was "not telling the truth."

[19] Nonetheless, I do not agree with Mr. Mohamed that the RAD was obliged to conduct an oral hearing before making the credibility determination on this point, or that the RAD erred by not evaluating the elements of subsection 110(6) before making its determination.

[20] It is important to underscore that in this part of its analysis, the RAD was not assessing evidence going to the merits of Mr. Mohamed's refugee claim. It was assessing evidence going to Mr. Mohamed's explanation as to why the new documents could not be provided before and thus whether they met the exception in subsection 110(4). In my view, subsection 110(6) has no application to this assessment.

[21] As reproduced above, subsection 110(6) permits the RAD to hold an oral hearing where, in its opinion, "there is documentary evidence referred to in subsection (3)" that meets the criteria in paragraphs (a), (b), and (c). The subsection thus only applies in circumstances where it determines there *is* evidence referred to in subsection 110(3). Such documentary evidence may only be filed by the claimant if they establish it meets the requirements of subsection 110(4). In other words, the RAD must determine whether there is evidence that meets the requirements of subsection 110(4) before conducting the subsection 110(6) assessment of whether that evidence (a) raises a serious issue of credibility, (b) is central to the decision on the refugee protection claim, and (c) would justify allowing or rejecting the claim. While the RAD must, of course,

consider the evidence a claimant files to establish that the requirements of subsection 110(4) are met, this does not mean that such evidence is itself admitted as new evidence in a manner that triggers application of subsection 110(6). I note that the criteria in paragraphs 110(6)(b) and (c) also suggest that the evidence being considered is evidence going to the merits of the refugee protection claim, and not to the requirements of subsection 110(4).

[22] Mr. Mohamed relies on the conclusion of Justice Wilson in *Singh (1985)* to argue that where a serious issue of credibility is involved, it is inconsistent with the principles of fundamental justice, and thus the common law duty of procedural fairness, to only hold a written hearing: *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 [*Singh (1985)*] at para 59. However, even if the duty of fairness would require an oral hearing in these circumstances, which I need not decide, any common law duty must yield to statutory provisions governing a tribunal's procedures, absent a constitutional challenge: *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 22. Subsection 110(6) is the only statutory provision that permits the RAD to hold an oral hearing. Subsection 110(3) provides that the RAD must otherwise proceed without a hearing. This statutory requirement ousts any common law procedural fairness requirements that might otherwise apply. As was the case in *Singh (2016)*, no constitutional challenge to the appeal regime set out in section 110 of the *IRPA* has been raised in this case: *Singh (2016)* at paras 61–63.

[23] I therefore conclude that the RAD did not breach its obligations under section 110 of the *IRPA* or the duty of procedural fairness in not conducting an oral hearing before making a

determination that the evidence tendered by Mr. Mohamed did not meet the requirements of subsection 110(4).

(2) The RAD's rejection of the new documentary evidence was unreasonable

[24] Although the RAD's determination under subsection 110(4) was not procedurally unfair, I conclude that it was unreasonable. The RAD did not reasonably address the evidence presented by each party with respect to the issue of representation, and placed undue reliance on the experience of counsel. Assessing this issue requires consideration of the evidence filed with respect to the allegations against former counsel, the RAD's determination with respect to those allegations, and its conclusions about other elements of the test for new evidence.

(a) *Evidence from Mr. Mohamed and former counsel*

[25] The core of Mr. Mohamed's allegation was that his former counsel had not given adequate advice on the evidence he should obtain for his RPD hearing. This included a failure to inquire as to psychological impacts of his detention, a failure to explain the need for medical and dental records, and a failure to request evidence from Mr. Mohamed's mother or from Mr. S, who had arranged for Mr. Mohamed's release from detention.

[26] Former counsel responded to these allegations with a statement that all of the allegations made against him by Mr. Mohamed were false, and gave an account of meetings that contradicted Mr. Mohamed's statements. In particular, he denied that he did not advise Mr. Mohamed to obtain a letter from his mother or Mr. S. He also said Mr. Mohamed did not tell

him he suffered from any psychological effects, and did not raise any psychological harm during the RPD hearing. Former counsel's statement attached a page he had prepared during a meeting with Mr. Mohamed and which he gave to him. The page summarized the documents Mr. Mohamed should obtain, which included "letter from father" and "letter from aunt," with some details as to what those letters should include. The page did not refer to obtaining evidence from Mr. Mohamed's mother or from Mr. S, although Mr. S is referred to in the summary of what the letter from the aunt should include. The summary of the aunt's letter also referred to Mr. Mohamed being "very scared, he felt like he was being followed or watched." No other notes of meetings between counsel and client were provided.

[27] Mr. Mohamed responded to former counsel's statement with an amended affidavit. He said he had forgotten about the summary page counsel had given him, but largely reiterated his evidence and contradicted former counsel's versions of the meetings and of the adequacy of the instruction he had been given. Mr. Mohamed gave more details of the initial meeting, including the discussion surrounding Mr. S. He also pointed to certain facts to contradict former counsel's account, including reference to his RPD evidence regarding his psychological difficulties.

[28] Former counsel filed a further response to this amended affidavit. It included a repeated statement that Mr. Mohamed did not tell counsel that he suffered psychological effects. It also reiterated that counsel had advised Mr. Mohamed to obtain a letter from Mr. S, but that Mr. Mohamed had responded that he could not get such a letter because of Mr. S's fear of authorities. Former counsel noted that he had successfully represented many refugee claimants from Sudan, and that when a witness is afraid to make a statement in writing as a result of a

credible fear of reprisal, “[f]or obvious reasons, this explanation is routinely accepted by the Refugee Protection Division.” I note that on my review of the hearing, counsel did not present such an explanation to the RPD, either in submissions or through questions to Mr. Mohamed.

[29] Mr. Mohamed filed a final further affidavit pertaining to his English language skills and providing information regarding the delay in obtaining some of the evidence, including the statement from Mr. S.

(b) *The RAD’s rejection of the argument about former counsel*

[30] The RAD briefly summarized the foregoing evidence and Mr. Mohamed’s requests to provide further documents, commenting in passing that “[t]he RAD notes the appellant was represented by experienced counsel both when his appeal was perfected and at the time of his RPD hearing.” The RAD rejected Mr. Mohamed’s argument that former counsel failed to provide clear instructions in the passage reproduced at paragraph [17] above. The RAD went on to refer to the onus on a claimant to prove their claim (noting for a third time that Mr. Mohamed was represented by very experienced counsel), and to address whether the additional documents were “new.” However, the RAD’s only analysis of the allegation of inadequate representation is in its reference to the notes, dates, and written instructions from former counsel; former counsel’s experience; and its conclusion that it gave more weight to “counsel’s detailed notes as compared to the appellant’s inconsistent and evolving allegations.”

[31] In my view, this analysis is insufficient to be reasonable as it does not demonstrate the justification, transparency, and intelligibility that are the very purpose of reasons: *Vavilov* at

paras 81, 99. It does not show that the RAD took the evidentiary record and Mr. Mohamed's submissions meaningfully into account: *Vavilov* at paras 125–128.

[32] The RAD's initial sentence introducing the issue stated that "The RAD does not find persuasive the appellant's argument that his counsel (before the RPD and RAD) failed to provide him clear instructions on the need to provide documentary evidence" [emphasis added]. I note that Mr. Mohamed's counsel before the RPD was not his counsel before the RAD. While the RAD also had apparent concerns with the timing of Mr. Mohamed's filing of documents before the RAD (which included filings after perfection), Mr. Mohamed made no argument that his counsel before the RAD failed to provide him with clear instructions on the need to provide evidence. That said, this misstatement on the part of the RAD does not render its analysis unreasonable. Rather, the focus must be on understanding the reasoning process followed by the RAD for its rejection of the new documents: *Vavilov* at paras 84–86.

[33] In essence, the RAD gave three reasons for its credibility finding: that former counsel provided detailed notes, dates and written instructions; that former counsel is very experienced in appearing before the RAD; and that Mr. Mohamed's allegations were inconsistent and evolving.

[34] The degree of detail, documentary corroboration through written instructions, and concerns about "inconsistent and evolving" testimony can certainly be grounds for a credibility finding, if adequately supported with consideration of the evidence. However, the RAD's analysis on these points did not address the principal issue put forward by Mr. Mohamed: that he had not been adequately advised to provide evidence of the nature that he subsequently put

forward. Nor did it address the extent to which the evidence filed by Mr. Mohamed and his former counsel supported or contradicted that principal issue. Mr. Mohamed made a number of arguments pointing out inconsistencies in former counsel's statements, none of which were addressed by the RAD. I do not propose to analyze these arguments or the strength of them, as that is not the Court's role on judicial review. I simply note that there were sufficiently material issues pertaining to the underlying argument that the RAD was obliged to consider and address more fully than through the blanket conclusions provided.

[35] Further, in my view, the experience of former counsel is not a ground on which significant weight can be placed in assessing allegations of inadequate representation or assessing the credibility of evidence on that issue. The most experienced counsel may err, and may provide inadequate advice in a particular case. Neither should the RAD privilege the testimony of counsel over that of a refugee claimant on the basis of their status or experience alone. While the RAD's comment in this regard may be taken as simply a "note" regarding counsel's experience, it takes on additional significance given that the RAD repeated this note on two other occasions in its reasons. This undue focus on counsel's experience suggests an improper approach that gives inherent credibility to counsel over a refugee claimant, rather than assessing credibility based on the evidence presented by counsel and their client. This concern is heightened given the absence of any explanation from the RAD about why it considered counsel's experience relevant to the credibility assessment.

[36] The RAD is not required to address every argument or piece of evidence raised by the parties: *Vavilov* at para 128. However, given the importance of the proposed new evidence to

Mr. Mohamed's refugee claim, and the impact of the adverse credibility determination, the RAD's reasons did not provide the requisite degree of justification, transparency, and intelligibility to demonstrate that the RAD had meaningfully accounted for the central issues and concerns raised: *Vavilov* at paras 88, 127, 133–135.

(c) *The RAD's conclusions on newness and weight*

[37] The unreasonableness of the RAD's decision regarding the inadequate representation allegation is not necessarily dispositive. The RAD went on to conclude that the documents are not "new" and that it would, in any event, have given them little weight if they were admitted. If these conclusions were reasonable, then the allegations against former counsel might ultimately be irrelevant, since the documents would nonetheless not have been admitted or, if admitted, would not have affected the outcome. However, on review of the RAD's reasons on these issues of newness and weight, I agree with Mr. Mohamed's arguments that they too were unreasonable.

[38] The RAD found that the evidence was not new since the information was simply a "reiteration of information and submissions already provided to the RPD." The RAD made specific reference to Mr. Mohamed's dental issues and found that the "letters from his family are not 'new,' but rather simply revised in response to the RPD's findings." While the description of this evidence as being a "reiteration" might reasonably apply to some of the evidence, I agree with Mr. Mohamed that it cannot reasonably apply to the statement from Mr. S. That statement presented, for the first time, first-hand evidence from the individual who allegedly arranged for Mr. Mohamed's release from detention. It also corroborated Mr. Mohamed's disappearance and his physical condition upon release. It cannot reasonably be considered a "reiterative" or "simply



revised” version of what had previously been filed. The RAD did not consider this statement separately or, indeed, refer to it at all other than perhaps through reference to “letters from his family,” although the statement from Mr. S was not in the form of a letter.

[39] The RAD then concluded that, even if admitted, it would give the new documents little weight in assessing the merits since they were of little relevance to the determinative issues. It referred, by way of example, to information in the new translation of the father’s statement, Mr. Mohamed’s conversations with his relatives, his scholarship, and country condition documents. It also reviewed the psychological evidence and found it to have little probative value. However, again the RAD made no reference to the most probative piece of new evidence, the statement from Mr. S that purports to corroborate the central element of Mr. Mohamed’s claim. The RAD gives no reason to conclude that this evidence should be given little weight if admitted, or that it was not relevant to or probative of the issues in the claim.

[40] I am conscious that administrative reasons must be read with sensitivity to the administrative setting in which they are given, and need not refer to every document or piece of evidence: *Vavilov* at paras 91–92. However, the fact that the RAD’s analysis on these issues does not refer to the significant statement from Mr. S raises concern that the RAD did not take the evidentiary record into account in its determination despite its statements to the contrary: *Vavilov* at para 126.

[41] I therefore conclude that the RAD’s further reasons regarding the issues of newness or the weight it would give the documents if admitted are unreasonable. They therefore do not

render moot the unreasonableness of the RAD's assessment of Mr. Mohamed's argument regarding inadequate representation.

[42] As a final observation, I note that the RAD also concluded that Mr. Mohamed had failed to meet his onus to explain why he was unable to provide his new documents with his Appeal Record, which was itself submitted late. It reached this conclusion without any reference to the evidence or arguments, including the statement from Mr. S saying he had tried to swear his statement in front of a number of lawyers, who refused to do so because of danger arising from their papers being reviewed by Sudanese security services.

B. *The RAD erred in upholding the RPD's adverse credibility findings*

[43] Mr. Mohamed raises a number of arguments regarding the RAD's assessment of his credibility. These arguments pertain to both the standard of review applied by the RAD and its treatment of the merits of those findings. Mr. Mohamed focuses in particular on the RAD's affirmation of the RPD's negative credibility finding resulting from Mr. Mohamed's inability to name the officer who detained and beat him, and on the RAD's treatment of the documentary evidence. For the reasons below, I conclude that the RAD's decision was unreasonable on these issues.

(1) The RAD unreasonably assessed the RPD’s findings on credibility

(a) *The RAD misstated and misapplied the applicable standard of review*

[44] The RAD set out its role in reviewing the RPD’s decision at the outset of its reasons. Relying on the Federal Court of Appeal’s decision in *Huruglica*, the RAD correctly noted that it is to apply a correctness standard to findings of law, fact, and mixed fact and law that do not raise an issue of credibility of oral evidence: *Huruglica* at paras 78–79. The RAD also correctly noted that in assessing credibility of oral evidence, “the RPD *may* have a meaningful advantage” [emphasis added by RAD], a statement consistent with *Huruglica* at paras 70–74.

[45] However, the RAD then went on to adopt statements of this Court regarding the role of the Court in reviewing factual findings of the RPD: *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 22, 42; *Hadi v Canada (Citizenship and Immigration)*, 2018 FC 590 at para 12. The RAD quoted in particular the frequently cited statement of Justice Gleason, then of this Court, that “the role of this Court is a very limited one because the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence”: *Rahal* at para 42.

[46] These references are out of place, as the RAD’s role in reviewing the RPD’s findings—including in respect of credibility—is different from that of the Court on judicial review: *Huruglica* at paras 47, 70–74; *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at paras 128–130. In particular, the RAD’s role includes making an assessment of whether the RPD “truly benefited” from an advantageous position, or whether it is a situation where “the

RPD may have no real advantage over the RAD”: *Huruglica* at paras 70, 72; *Rozas del Solar* at paras 86–91. It also entails an approach to deference that is not the same as that on judicial review: *Rozas del Solar* at paras 131–133.

[47] The RAD’s statement therefore suggests that it misapprehended its role in reviewing the RPD’s decision, as it indicates that the RAD considered a “significant deference” standard warranted, and that it considered its role “a very limited one.”

[48] This misstatement may not have affected the decision as a whole if the RAD’s actual analysis of the RPD’s findings showed that this misstatement was immaterial or that it actually applied the proper standard. In my view, it does not.

[49] As Mr. Mohamed points out, the RAD did not set out with clarity the standard it was applying to the particular credibility findings at issue. In particular, it did not say whether it found the RPD to have a meaningful advantage with respect to any of the findings, and thus whether it considered deference warranted. However, the RAD’s reasons suggest it adopted an overly deferential approach to the RPD’s findings based on Mr. Mohamed’s testimony. In this regard, I cannot accept the Minister’s assertion that the RAD made it clear throughout its decision that it was reviewing the correctness of the RPD’s decision.

[50] This is seen in particular in the passage of the RAD’s reasons addressing one of the RPD’s critical credibility findings, namely that Mr. Mohamed “fabricated” the officer who detained and beat him. The RPD reached this conclusion on the basis that Mr. Mohamed “was

unable to name the officer,” and that while he thought his aunt was aware of the officer’s identity, he did not ask her. The RAD’s discussion of this finding was the following:

*Vague Testimony about Allegations*

The RPD took a negative inference as to the credibility of the appellant’s allegations due to his vague testimony, particularly about the alleged agent(s) of persecution, as well as the basis of the appellant’s claim related to national service requirements in Sudan.

The appellant very generally argues the RPD erred because it is plausible he would not know more details about his claim because he was traumatized. He argues the RPD misconstrued the evidence.

Having independently reviewed the evidence, including the RPD’s questions (and follow-up questions) and the appellant’s responses, the RAD does not agree with the appellant’s argument. The RPD asked the appellant simple and direct questions about his own allegations of persecution. The questions asked of him were not difficult nor complicated or controversial. Further, there is no evidence to suggest the appellant did not comprehend the questions being asked of him. The RAD accordingly sees no reason to interfere with the RPD’s adverse inferences due to the appellant’s vague testimony, which was lacking specific details about the central elements of his basis of claim for protection. The RPD’s findings are a result of a comprehensible reasoning process and based on the evidence before it.

[Emphasis added.]

[51] Although the RAD referred to having “independently reviewed the evidence,” its ultimate conclusion was that the RPD’s findings were “a result of a comprehensible reasoning process and based on the evidence before it.” This language suggests a deferential approach to review of this issue. The RAD, however, gave no indication as to why it considered the RPD to have had a meaningful advantage in making a credibility finding on this basis. To the contrary, the RAD states that it independently reviewed the evidence and expressed no difficulty in doing so.

[52] Further, as Mr. Mohamed points out, the language used by the RAD—“the result of a comprehensible reasoning process”—is the language that was adopted by the majority of a three-member panel of the RAD in *X (Re)*, 2017 CanLII 33034 (CA IRB) at paras 73–74. That decision was subject to judicial review in *Rozas del Solar*, in which Justice Diner rejected the RAD’s approach as improperly duplicative of the judicial review standard:

[114] The RAD majority turned to *Dunsmuir [v New Brunswick, 2008 SCC 9]* in concluding that it should assess both process and outcome. That is to say, the RPD’s finding would stand if it was the result of a comprehensible reasoning process, meaning that the RAD could read the RPD’s conclusion and understand how it was reached, and its outcome was supported by the evidence.

[...]

[126] In brief, after considering the RAD majority’s rationale, I do not find that their RAD reasonableness standard is distinguishable from the reasonableness standard used on judicial review merely because it necessitates an independent assessment.

[...]

[130] In my view, the RAD majority’s conclusions on the content of its deferential standard are not consistent with the Federal Court of Appeal’s instructions that the RAD is not to review RPD decisions in the manner of a judicial review.

[Emphasis added; citation omitted.]

[53] I note that this Court’s decision in *Rozas del Solar* was only issued in late 2018, and may not have come to the attention of the RAD panel at the time their decision was rendered in June of 2019. Nonetheless, I conclude that the RAD’s misstatement of its appellate role and the reason it gave for upholding the RPD’s negative credibility finding indicate that it did not apply the appropriate standard of review on this issue.

(b) *The RAD's analysis of the credibility finding was unreasonable*

[54] I also find the RAD's substantive assessment of the credibility finding to be unreasonable. To begin, I agree with Mr. Mohamed that the RAD erred in characterizing the RPD's finding as being one based on "vague testimony." The RPD did not rely on the vagueness of Mr. Mohamed's testimony, but on his inability to name the individual who had beaten him, and the fact that he had not asked his aunt for that information. While the Minister insisted that this does amount to a conclusion that the evidence was "vague," I cannot agree. The RPD did not address the question as one of vagueness, but stated that the evidence was unreasonable because it "would have expected that if the claimant feared a specific person as his principal agent of persecution, that he would have made efforts to find out that person's identity." This is, in essence, a finding that (a) Mr. Mohamed's fear was of one particular officer as his "principal agent of persecution," rather than of the NISS and the Sudanese government more broadly; and (b) it was implausible that Mr. Mohamed would have been detained and beaten by that officer without wanting to find out his name.

[55] The RAD's characterization of the finding is not itself a significant concern. However, it led the RAD to also mischaracterize Mr. Mohamed's arguments and provide responding reasons that did not address those arguments. The RAD saw no reason to interfere with the RPD's finding because the RPD asked "simple and direct questions" that were "not difficult nor complicated or controversial," and that Mr. Mohamed understood the questions. However, Mr. Mohamed did not argue that he misunderstood the RPD's questions or that they were unduly complex. He argued that the RPD erred by relying on the fact that he did not know the officer's

name and that it was implausible that someone would be detained and beaten without seeking to find that out. The RAD's failure to "meaningfully grapple with" the central argument raised by Mr. Mohamed on this critical credibility finding was unreasonable: *Vavilov* at paras 127–128.

[56] Nor did the RAD provide any information to support its own apparent conclusion that Mr. Mohamed's testimony was "vague" or "lacking specific details about the central elements" of his claim. As Justice Fuhrer noted in her decision in *Oria-Arebun*, the RAD, like the RPD, "is under 'a duty to give its reasons for casting doubt upon the appellant's credibility in clear and unmistakable terms' when conducting its own credibility assessment": *Oria-Arebun v Canada (Citizenship and Immigration)*, 2019 FC 1457 at para 55, citing *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 (FCA) at para 6; *Zaytoun v Canada (Citizenship and Immigration)*, 2014 FC 939 at para 7.

[57] The RAD gave no indication as to what it found "vague" about Mr. Mohamed's testimony on this issue. It cannot be taken to have adopted conclusions about "vagueness" from the RPD, since the RPD's only reference to vagueness pertained to Mr. Mohamed's unrelated statements about not wanting to fight the government's wars or kill innocent people. Nor did the RAD indicate what "specific details" it considered to be lacking from Mr. Mohamed's testimony or, to the extent that this could be taken as referring to the name of the officer, why that impacted Mr. Mohamed's credibility.

[58] I therefore conclude that the RAD's reasons on this issue do not meet the requirements of justification, transparency, and intelligibility required for a reasonable decision: *Vavilov* at



para 99. Given the centrality of this adverse credibility finding—which led the RPD to conclude that Mr. Mohamed had fabricated an agent of persecution—this error necessarily affected the reasonableness of the decision as a whole: *Vavilov* at para 100.

(c) *The RAD erred in its treatment of the documentary evidence*

[59] At his hearing before the RPD, in addition to his own testimony and references to country condition evidence, Mr. Mohamed presented seven primary pieces of documentary evidence. Three of these bore on his allegations that he was detained and beaten by the NISS: a medical certificate, a letter from his father, and a letter from his aunt. The medical certificate stated that Mr. Mohamed came to the hospital on the date he claimed to have been released from detention, and that he suffered and was treated for a broken wrist, four broken front teeth, and a cut under his eye. The father's letter (as first translated) included statements repeating Mr. Mohamed's story regarding his detention, beating, and release. The aunt's letter similarly repeated the story, but also indicated that she contacted her son-in-law, Mr. S, who took her to search for Mr. Mohamed, and described his condition when she saw him after he was released.

[60] The RPD considered each of these at the outset of its reasons. It stated that the medical certificate did not give details regarding the trauma that may have caused the injuries, and noted the "limitation of medical certificates in regards to assessing the cause of physical injuries." The RPD gave little weight to the father's letter, since he was not in Sudan at the time and therefore could give only second-hand knowledge. The RPD gave "the most probative value" to the aunt's letter, but stated that the "only first-hand evidence" provided was her physical description of Mr. Mohamed on the date he claims he was released.

[61] On appeal, Mr. Mohamed argued that although the RPD referred to the documents, it did not consider them in assessing his claim and his credibility. In particular, the RPD did not consider how the aunt's confirmation that he had been missing and had physical injuries, as confirmed by the medical certificate, corroborated his account of being detained and beaten by the NISS before dismissing that account on the basis of Mr. Mohamed's credibility.

[62] The RAD found that the RPD had clearly not ignored the documents, given its references to the documents and its highlighting of concerns such as first-hand knowledge of the incidents.

The RAD then stated as follows:

The RPD found the appellant's responses not to be credible and, therefore, accorded little probative weight to his untested documents and letters, which were themselves also found to be very vague. Further, the RPD's findings are in accordance with settled law; particularly that when a general negative credibility finding is made by the RPD, it is open for it to give low probative value to other documents. The RAD also notes the decision in *Gebetis [v Canada (Citizenship and Immigration)]*, 2013 FC 1241 at para 29] indicating: "as stated by this Court numerous times, general findings of lack of credibility can affect all relevant evidence submitted by an applicant, including documentary evidence and ultimately cause the rejection of a claim."

[Emphasis in original; footnote omitted.]

[63] As the Minister conceded during oral argument, the RAD's characterization of the RPD's conclusions is again simply incorrect. The RPD did not accord little probative weight to the documents based on its conclusions about Mr. Mohamed's credibility. Nor did it rely on the fact that the documents and letters were "untested." At no point did the RPD conclude that based on a "general negative credibility finding," it gave low probative value to other documents, whether or not it was open to the RPD to do so.

[64] In addition to quoting *Gebet*, the RAD went on to cite paragraph 21 of the decision of Justice Nadon, then of this Court, in *Hamid v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 1293:

Once a Board, as the present Board did, comes to the conclusion that an applicant is not credible, in most cases, it will necessarily follow that the Board will not give that applicant's documents much probative value, unless the applicant has been able to prove satisfactorily that the documents in question are truly genuine. In the present case, the Board was not satisfied with the applicant's proof and refused to give the documents at issue any probative value. Put another way, where the Board is of the view, like here, that the applicant is not credible, it will not be sufficient for the applicant to file a document and affirm that it is genuine and that the information contained therein is true. Some form of corroboration or independent proof will be required to "offset" the Board's negative conclusion on credibility.

[Emphasis added.]

[65] It appears that the RAD takes *Gebet* and *Hamid* to stand for a proposition that the RPD can make an adverse credibility finding based on an applicant's testimony and then discount corroborative documentary evidence on the basis of that finding. To the extent that *Gebet* and *Hamid* stand for that proposition, they appear to be in conflict with cases such as *Chen* and *Yu*, which confirm that corroborative evidence must be assessed before reaching an adverse credibility finding: *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at paras 19–21; *Yu v Canada (Citizenship and Immigration)*, 2015 FC 1138 at paras 34–35.

[66] I need not decide this issue, but in my view, *Gebet* and *Hamid* cannot be taken for so broad a proposition. In *Hamid*, for example, the IRB had in fact analyzed the documents in question, finding them not to be genuine, and the Court was considering the claimant's argument that the IRB was required to analyze that evidence *independently* of the applicant's testimony:

*Hamid* at paras 17–19. Similarly, in *Gebet*, the Court found that the RPD took all of the documentary evidence into account, but that it was reasonable to attribute little weight to them as they relied on underlying facts found not to be credible: *Gebet* at paras 28–29.

[67] In any event, in my view *Chen* and *Yu* better represent the law as being consistent with the role and purpose of corroborative evidence. I note that the Federal Court of Appeal’s decision in *Sheikh*, frequently cited on this issue, does not go so far as to state a general proposition that once a credibility finding is made on the basis of testimony, any corroborative documentation can be simply discounted on that basis: *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 at para 8. In that case, which dealt with “no credible basis” findings, the Court of Appeal noted that a first-level panel may find an applicant “so lacking in credibility” that it concludes that there is no credible evidence on which a second-level panel could uphold the claim. In other words, “a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony”: *Sheikh* at para 8. This passage does not endorse an approach in which credibility findings are made prior to, or without assessment of, other relevant corroborative evidence.

[68] Nor does the Court of Appeal’s decision in *Sellan*, referenced by the Minister in oral argument, stand for such a broad proposition: *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3. There, the Court of Appeal was dealing with a certified question regarding whether the IRB was required to undertake an assessment under section 97 of the *IRPA* based on the objective country condition evidence, after it found non-credible the applicant’s asserted fear of persecution and evidence that he was personally in need of

protection: *Sellan v Canada (Citizenship and Immigration)*, 2008 FC 44 at paras 5–6, 10–12; *Sellan (FCA)* at paras 2–3. The Court of Appeal answered that question at paragraph 3, stating that:

[...] where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[69] In the context in which it was decided, dealing with whether objective country condition evidence can itself establish a section 97 claim, I cannot take *Sellan (FCA)* as speaking to, or endorsing, an approach to credibility findings in which credibility determinations are made prior to an assessment of corroborative evidence, and the corroborative evidence is then discounted on the basis of the credibility determination.

[70] In the present case, unlike in *Hamid*, there was no identified issue with respect to the genuineness of any of the documents. The letters from Mr. Mohamed's father and aunt were not questioned by the RPD as not being genuine letters from them. Nor did the RPD raise concerns about the genuineness of the medical certificate.

[71] The RAD went on to conduct its own independent review of Mr. Mohamed's documents. It did so by noting that these documents were very brief, that no originals were provided, that the letters were not sworn or witnessed, that no contact information was provided, nor were the authors offered as potential witnesses to be cross-examined. On these grounds, the RAD found them to be insufficient to offset its credibility concerns.

[72] I again agree with Mr. Mohamed that these were unreasonable grounds on which to discount the documents. It was improper for the RAD to rely on issues regarding the genuineness of the documents (such as not producing originals) when this was not raised by the RPD and Mr. Mohamed had no basis to respond: *Laag v Canada (Citizenship and Immigration)*, 2019 FC 890 at para 23. I note that this was not a case in which the RPD questioned the genuineness of the documents and the RAD simply raised new concerns on the same issue: *Jiang v Canada (Citizenship and Immigration)*, 2018 FC 1064 at paras 16–17.

[73] It was also unreasonable to rely on the fact that the letters were not sworn or that the authors were not put forward as witnesses: *Oria-Arebun* at paras 51–52. In the language of Justice Mahoney of the Federal Court of Appeal “[i]t is not for the Refugee Division to impose on itself or claimants evidentiary fetters of which Parliament has freed them”: *Fajardo v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 915 (CA) at para 4; *Oria-Arebun* at para 52.

[74] I therefore conclude that the RAD’s analysis of the RPD’s assessment of the documentary evidence, and its own assessment of that evidence, were unreasonable.

#### IV. Conclusion

[75] The application for judicial review is therefore granted. The decision of the RAD is set aside and sent back to a different panel of the RAD for redetermination, both as to Mr. Mohamed’s application for the admission of new evidence and as to the merits of the appeal.

[76] The Minister advised that it was not proposing a question for certification. Mr. Mohamed also did not propose a question for certification in advance of or at the outset of the oral hearing. At the conclusion of the hearing, Mr. Mohamed's counsel asked for an opportunity to consider whether a question would be proposed for certification with respect to an aspect of issue A(1) above, namely whether evidence filed to show that new evidence met the requirements of subsection 110(4) of the *IRPA* could trigger a requirement for an oral hearing under subsection 110(6). I advised that I would not rule on that request immediately, but would assess whether the issue was potentially determinative, and if so, whether I should receive submissions on the issue.

[77] For the reasons set out above, I conclude that the issue in question is clearly not determinative of this application for judicial review. In particular, I have concluded that the RAD's refusal to accept Mr. Mohamed's new documents was unreasonable, even though I have concluded that procedural fairness does not require an oral hearing. Being dispositive of the matter is a requirement for certification of a question pursuant to subsection 74(d) of the *IRPA*: *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36. I therefore conclude that I should not certify a question and that I need not permit further submissions from Mr. Mohamed on the question of certification.

**JUDGMENT IN IMM-3925-19**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed, and Mr. Mohamed's appeal from the decision of the Refugee Protection Division dated August 24, 2018 is remitted to the Refugee Appeal Division for redetermination by a different panel.

\_\_\_\_\_  
"Nicholas McHaffie"

Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3925-19

**STYLE OF CAUSE:** AMMAR AHMED ABUGIBBA MOHAMED v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 20, 2020

**JUDGMENT AND REASONS:** MCHAFFIE J.

**DATED:** DECEMBER 11, 2020

**APPEARANCES:**

Richard Wazana FOR THE APPLICANT

Asha Gafar FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

M. Shannon Black FOR THE APPLICANT  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario