

Federal Court



Cour fédérale

**Date: 20230315**

**Docket: IMM-3508-22**

**Citation: 2023 FC 351**

**Ottawa, Ontario, March 15, 2023**

**PRESENT: The Honourable Madam Justice Aylen**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Applicant**

**and**

**ANAS MOHAMED**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada dated March 29, 2022 [Decision], wherein the RAD reversed the decision of the Refugee Protection Division [RPD] that the Respondent was not a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Respondent, a citizen of Kenya, had asserted that he fears the family of his ex-girlfriend, Salma, because he was having a secret relationship with her and got her pregnant. He asserted that Salma's family members threatened his father and burned down his father's shop and that they will kill the Respondent if he returns to Kenya. The RPD determined that the Respondent had failed to establish, on a balance of probabilities, that Salma exists and that he and his family are targeted by her father as result of their relationship.

[3] The RAD found that the Respondent is indeed a person in need of protection as he would face a risk to his life under s. 97 of *IRPA*.

[4] The Applicant asserts that the RAD's decision was unreasonable on the basis that the RAD erred in: (a) its assessment of new evidence; (b) misapprehending and ignoring evidence in rendering its decision; and (c) failing to provide a reasonable explanation for determining the RPD had erred in its decision.

[5] The parties agree and I concur that the Decision is reviewable on a standard of reasonableness. When reviewing for reasonableness, the Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker [see *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and

transparency [see *Adenjjj-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

[6] While the Applicant has raised a number of issues on this application, I find that the determinative issue is the RAD's failure to conduct an admissibility assessment of a portion of the new evidence proffered by the Respondent in support of his appeal.

[7] In support of his appeal to the RAD, the Respondent requested that the RAD admit into evidence three categories of document that he asserted constituted new evidence:

- A. Intimate photos of Salma and the Respondent from Nairobi, Kenya;
- B. Text messages between the Respondent and Salma that the Respondent was able to download from his iCloud account; and
- C. Photos of Rumana Robow Adan, her driver's license and an affidavit from Rumana Robow Adan affirming that she is not Salma.

[8] Subsection 110(4) of the IRPA addresses the admission of new evidence on appeal to the RAD and provides:

Evidence that may be presented	Éléments de preuve admissibles
(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.	(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.

[9] Subsection 110(4) provides that the RAD can only consider new evidence if: (i) it arose after the RPD's decision; or (ii) if the evidence was not reasonably available at the time or the person could not reasonably have been expected to present it at the time of the RPD's negative decision. The strict statutory criteria reflect a restrictive approach to new evidence [see *Demberel v Canada (Citizenship and Immigration)*, 2016 FC 731 at para 31; *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at para 63]. The test set out in subsection 110(4) is disjunctive, meaning that the RAD must consider whether the new evidence fails to meet both conditions laid out in subsection 110(4) [see *Olowolaiyemo v Canada (Citizenship and Immigration)*, 2015 FC 895 at paras 19-20]. Further, even if the Applicants' evidence falls into one of the two categories covered in subsection 110(4), the RAD still has the discretion to accept it or not [see *Olowolaiyemo, supra* at para 20]. However, if the RAD determines that the new evidence does not meet the requirements of subsection 110(4), the RAD has no discretion to admit the evidence [see *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 at paras 23, 45].

[10] If the new evidence meets the express criteria of subsection 110(4), the RAD must also be satisfied that it meets the implicit criteria of credibility, relevance, materiality and newness [see *Singh, supra* 2016 FCA 96 at paras 38 and 74].

[11] In this case, while the RAD conducted an assessment of the admissibility of the documents related to Rumana and of the intimate photos of Salma and the Respondent, the RAD's decision contains no mention of the Respondent's request to admit the text messages and no assessment of any kind regarding their admissibility under subsection 110(4).

[12] There can be no doubt that the admissibility of the text messages was a live issue before the RAD, as both the Applicant and the Respondent made submissions thereon. In particular, the Applicant made admissibility submissions that were specific only to the text messages. The fact that the RAD does not address the Applicant's text message-specific submissions in its Decision demonstrates that the RAD did not properly consider the Applicant's submissions and forecloses any suggestion that the RAD may have collapsed its analysis of the text messages and photos into one category.

[13] The RAD's failure to properly assess the admissibility of the text messages is particularly problematic given that the RAD went on to place "significant weight" on the text messages in finding that the Respondent had established his relationship with Salma.

[14] The RAD's failure to conduct an assessment of the admissibility of the text messages constitutes a fatal break in the rational chain of analysis required of a reasonable decision.

Accordingly, the application for judicial review shall be granted, the RAD's decision shall be set aside and the appeal shall be remitted to a differently-constituted panel of the RAD for redetermination.

[15] Neither party proposed a question for certification and I agree that none arises.

[16] By way of a concluding matter, the Applicant requested in their further memorandum of fact and law that the name of the Applicant be amended to the Minister of Citizenship and Immigration, as it was an inadvertent error to name the Minister of Public Safety and Emergency Preparedness as the Applicant. The requested relief shall be granted.

**JUDGMENT in IMM-3508-22**

**THIS COURT'S JUDGMENT is that:**

1. The style of cause shall be amended with immediate effect to name the Minister of Citizenship and Immigration as the sole Applicant.
2. The application for judicial review is granted, the decision of the Refugee Appeal Division is set aside and the matter is remitted to a differently-constituted panel of the Refugee Appeal Division for redetermination.
3. The parties proposed no question for certification and none arises.

“Mandy Aylen”

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Judge

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

**DOCKET:** IMM-3508-22

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION V ANAS MOHAMED

**PLACE OF HEARING:** VIDEO-CONFERENCE

**DATE OF HEARING:** MARCH 14, 2023

**JUDGMENT AND REASONS:** AYLEN J.

**DATED:** MARCH 15, 2023

**APPEARANCES:**

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Zofia Rogowska

FOR THE APPLICANT

Tina Hlimi

FOR THE RESPONDENT

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