

Federal Court



Cour fédérale

**Date: 20230607**

**Docket: IMM-8586-22**

**Citation: 2023 FC 797**

**Ottawa, Ontario, June 7, 2023**

**PRESENT: The Honourable Madam Justice Rochester**

**BETWEEN:**

**JARED MOCHERE ONG'UTI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Jared Mochere Ong'uti, is a citizen of Kenya. He claims that he is at risk of persecution by members of the Sungu Sungu by reason of his work campaigning for the Orange Democratic Movement [ODM]. He alleges that his cousins and brother, who were also ODM supporters, were attacked in separate incidents and died as a result. The Applicant fled Kenya in 2018 by air and claimed refugee status at the airport on arrival.

[2] The Applicant seeks judicial review of a decision by the Refugee Appeal Division [RAD] dated August 10, 2022, dismissing the Applicant's appeal and confirming the decision of the Refugee Protection Division [RPD] to reject their claim for refugee protection, finding that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27* [IRPA]. The determinative issue for both the RAD and the RPD was credibility. The RAD's independent assessment supported the RPD's conclusion that the Applicant lacked credibility, that he intentionally filed inauthentic documents, and that his narrative has been substantially fabricated.

[3] The Applicant submits that the RAD erred in: (i) refusing the Applicant's new evidence; (ii) failing to take into consideration the Applicant's psychotherapist's report; (iii) assessing the relationship between the Applicant and the individual whom he alleges was his brother; (iv) assessing the evidence from the Applicant's other family members; (v) assessing the photographic evidence; (vi) assessing the Applicant's work with the ODM; and (vii) determining that there was no continued interest in the Applicant by the Sungu Sungu. During the hearing, the Applicant focused his oral argument items (i), (ii), (iv), and (vi), while relying on his written submissions for items (iii), (v), and (vii).

[4] The Respondent submits that the RAD's decision that the Applicant is not credible was reasonable given the significant number of inconsistencies and omissions in the Applicant's evidence. The Respondent states that the Applicant is simply seeking to have this Court re-weigh the evidence. The Respondent objects to a number of the issues raised by the Applicant, chief of

which is the RAD's treatment of the psychotherapist's report, on the basis that they were not raised on appeal to the RAD.

[5] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicant has failed to persuade me that the RAD's decision is unreasonable. For the reasons that follow, this application for judicial review is dismissed.

## II. Standard of Review

[6] The parties agree that the applicable standard of review is that of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125).

## III. Analysis

[7] As noted above, the determinative issue for both the RPD and the RAD was credibility. Credibility determinations are part of the fact-finding process, and are afforded significant

deference upon review (*Fageir v Canada (Citizenship and Immigration)*, 2021 FC 966 at para 29 [*Fageir*]; *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at para 35 [*Tran*]; *Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 6). Such determinations by the RPD and the RAD demand a high level of judicial deference and should only be overturned “in the clearest of cases” (*Liang v Canada (Citizenship and Immigration)*, 2020 FC 720 at para 12 [*Liang*]).

[8] Credibility determinations have been described as lying within “the heartland of the discretion of triers of fact [...] and cannot be overturned unless they are perverse, capricious or made without regard to the evidence” (*Fageir* at para 29; *Tran* at para 35; *Edmond v Canada (Citizenship and Immigration)*, 2017 FC 644 at para 22, citing *Gong v Canada (Citizenship and Immigration)*, 2017 FC 165 at para 9).

[9] The Applicant has effectively raised seven issues with the RAD’s treatment and assessment of the evidence. Save for the issue of the new evidence, the Respondent submits that the Applicant is simply seeking to have this Court re-weigh the evidence considered by the RAD and that the RAD reasonably concluded that the Applicant was not credible.

[10] I am mindful of the instructions of the Supreme Court of Canada in *Vavilov*, namely that the reviewing court should not approach the underlying decision with the intention of conducting a “line-by-line treasure hunt for error” (at para 102), but rather concern itself with whether “the decision as a whole is transparent, intelligible and justified” (at para 15).

[11] Having considered the record and the parties' submissions, I find that the RAD's decision when taken as a whole is reasonable in light of the record before it and exhibits the justification required by *Vavilov*. The Applicant's arguments are, in my view, an impermissible request to re-assess the evidence considered by the RAD (*Vavilov* at para 125). Moreover, they pertain to the credibility determinations made by the RAD, which are owed a high level of judicial deference (*Liang* at para 12). I have not been persuaded by the Applicant that the RAD's credibility findings are unreasonable. Given the inauthentic documents filed by the Applicant and the contradictions in his testimony and the evidence, these findings were open to the RAD to make.

[12] Two of the Applicant's submissions bear specific mention. Turning first to the RAD's rejection of the Applicant's new evidence. The Applicant submits that the RAD should have accepted the new evidence, and in particular, the birth certificate from the individual that the Applicant alleges was his brother. There is no allegation that the RAD did not apply the correct test, namely subsection 110(4) of IRPA and the criteria in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 and *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385. Rather, the Applicant pleads that the RAD erred by not accepting the Applicant's explanation as to why the birth certificate was not available sooner.

[13] The Respondent pleads that the RAD reasonably rejected the Applicant's explanation, in light of his credibility issues and the reliability issues of the document itself. The Respondent submits that this was a clear attempt by the Applicant to supplement a deficient record before the RPD.

[14] The Applicant has failed to convince me that the RAD committed a reviewable error in rejecting his new evidence. I agree with the Respondent that the RAD was entitled to find that the Applicant's explanation was not credible.

[15] I turn now to the Applicant's psychotherapy report. The Applicant submits that the RAD erred in the manner it treated it, specifically, that it ought to have taken it into consideration when making its credibility findings. The Respondent objects to the Applicant raising this argument, because the issue of the psychotherapy report was not raised before the RAD. The Respondent further submits that the report cannot act as a cure-all for the deficiencies in his evidence, including the inconsistencies in the documentary evidence.

[16] I agree with the Respondent on this point, in that it is not appropriate for the Applicant to impugn the RAD's decision based on an issue that he had not previously raised (*Singh v Canada (Citizenship and Immigration)*, 2023 FC 636 at para 16 [*Singh*]). Indeed, the RAD can hardly be faulted for not considering the psychotherapy report in greater depth when the issue was not raised before it on appeal (*Singh* at para 15; *Onwuasoanya v Canada (Citizenship and Immigration)*, 2022 FC 1765 at para 15 [*Onwuasoanya*]; *Dakpokpo v Canada (Citizenship and Immigration)*, 2017 FC 580 at para 14; *Enweliku v Canada (Citizenship and Immigration)*, 2022 FC 228 at para 42).

[17] The Applicant pleads that his psychological state impacted his ability to testify and the RAD ought to have independently assessed the report, regardless if it was raised or not. As noted above, a reasonable decision is one that is justified in relation to the facts and the law that

constrain the decision maker (*Vavilov* at para 85). Considering the facts and the evidence before the RAD, including the psychotherapy report, I find that the RAD's credibility findings are justified in light of the record that constrained it. The psychotherapy report cannot, in my view, act as a cure-all for the deficiencies and inconsistencies in the Applicant's evidence, and the resulting credibility findings (*Onwuasoanya* at para 16; *Khatun v Canada (Citizenship and Immigration)*, 2012 FC 159 at para 94).

#### IV. Conclusion

[18] For the reasons set out above, I am of the view that the Applicant has failed to meet his burden of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). I therefore dismiss this application for judicial review.

[19] No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

**JUDGMENT in IMM-8586-22**

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

1. The Applicant's application for judicial review is dismissed; and
2. There is no question for certification.

"Vanessa Rochester"

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Judge



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

**DOCKET:** IMM-8586-22

**STYLE OF CAUSE:** JARED MOCHERE ONG'UTI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 1, 2023

**JUDGMENT AND REASONS:** ROCHESTER J.

**DATED:** JUNE 7, 2023

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