Federal Court  Cour fédérale

Date: 20241011

Docket: IMM-11445-23

Citation: 2024 FC 1621

Toronto, Ontario, October 11, 2024

PRESENT: The Honourable Justice Battista

BETWEEN:

ABDULLAH ATHMAN AL-LAMY
(aka ABDULRAHMAN ABDULLATIF MOHAMED)

SOFIYAH HAMID AHMAD
(aka SWAFIYA AHMED MOHAMED BEREKY)

WALEED ABDULLAH AL-LAMY
(aka MUAYYAD ABDULRAHMAN ABDULLATIF)

WAHEED ABDULLAH AL-LAMY
(aka MUADH ABDULRAHMAN ABDULLATIF)

WIYYAAM ABDULLAH AL-LAMY
(aka HUMAIRA ABDULRAHMAN ABDULLATIF)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants challenge a decision of the Refugee Appeal Division (RAD) that dismissed an appeal from the negative decision on their refugee claims. The claims were denied based on the Applicants' lack of credibility, and on the conclusion that their ethnic and religious identities would not expose them to a serious risk of persecution.

[2] This application will be granted because the RAD misapprehended the Applicants' submissions and failed to explain why the Applicants did not face risks based on evidence of their ethnic and religious identities, which was not disputed.

II. Background

[3] The Applicants are Kenyan citizens who travelled to Canada and initially advanced claims for refugee protection alleging that they are Somalis. The Respondent intervened in the Applicants' refugee proceedings to establish that they were Kenyan citizens. The Principal Applicants then admitted their true identities and changed the basis of their claims. They advanced claims on two grounds: first, based on fears of the agent networks who brought them to Canada and counseled them to misrepresent themselves, and second, based on fears of persecution in Kenya due to their identities as Swahili Muslims.

[4] The Refugee Protection Division (RPD) rejected the claims based on the Applicants' lack of credibility. However, the RPD also examined evidence of country conditions in Kenya and concluded that the Applicants would not be at risk of persecution based on their ethnic or religious identities. The RPD concluded that the Applicants themselves had not been subjected to harm

based on their religion or identity, and that state protection, while not perfect, was available in Kenya.

[5] On appeal, the RAD agreed with the RPD's adverse credibility findings. Regarding the Applicants' identity-based fear, the RAD stated that the Applicants did not challenge the RPD's findings that they were not at risk of persecution on that basis and, citing Federal Court jurisprudence, found that it was not required to provide reasons for unchallenged findings. Nevertheless, the RAD briefly stated that it reviewed the record from the RPD and agreed with the RPD's conclusion that the Applicants did not face risk under sections 96 or 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

III. Issue

[6] The sole issue is whether the RAD's decision is reasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], affirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*]). A decision will be found unreasonable when its reasons fail to provide a transparent and intelligible justification (*Vavilov* at para 136).

IV. Analysis

[7] The RAD's decision is unreasonable for the following reasons:

- The RAD misstated the Applicants' submissions when it stated that the Applicants did not challenge the RPD's risk assessment;
- The RAD unreasonably determined that it was not required to assess the correctness of the RPD's risk findings, which it perceived to be unchallenged; and

- Having engaged in an assessment of the RPD's risk finding, the RAD's reasons for upholding the finding were not transparent nor justified.

A. *Misstatement of the Applicants' submissions*

[8] As stated above, the RPD found that the Applicants' fears of persecution based on their religion and ethnicity were not well-founded. The RAD and counsel for the Respondent incorrectly state that the Applicants did not challenge these findings.

[9] In their submissions to the RAD, the Applicants stated that their "fear of persecution based on their ethnicity is objectively well founded as shown in the document provided," and the Applicants identified documentary evidence contesting the RPD's finding. The Applicants then stated that "this clearly shows that the discrimination which the [Applicants] faces [*sic*] is clearly systemic and rises to the level of persecution." Under the heading "What they [*sic*] Appellants fear," their counsel stated that "[t]hey also fear that they may be harmed and killed as part of the security clamp down on Muslims who they view as terrorists in Kenya."

[10] Admittedly, these submissions were not substantial, but it is clear that the RPD's risk assessment based on the Applicants' identities was contested. The RAD's lack of responsiveness to these submissions renders the decision unreasonable (*Vavilov* at para 128).

B. *The RAD was required to assess risk findings*

[11] The RAD was therefore mistaken about the scope of the Applicants' submissions. However, it also made the unreasonable finding that it was not required to verify the RPD's assessment of risks under sections 96 and 97 of the *IRPA*. This assessment is at the heart of refugee claims, and at the heart of the duties of both the RPD and the RAD. A decision maker's

misunderstanding of its role in a manner inconsistent with its governing statutory scheme renders a decision unreasonable (*Vavilov* at paras 108, 111). Just as a decision maker cannot "arrogate powers to themselves that they were never intended to have" (*Vavilov* at para 109), it is unreasonable for a decision maker to eschew powers they were intended to have.

[12] As stated above, the Applicants' claims were based not only on their personal testimony regarding their experiences, but on their identities as Swahili Muslims. Their personal testimony was found not credible, but neither the RPD nor the RAD disbelieved their ethnic and religious identities. The RAD had an obligation to assess the RPD's risk conclusions based on the Applicants' identities, regardless of whether these conclusions were challenged.

[13] The RAD cited three Federal Court decisions to justify its finding that it was not required to verify the RPD's conclusion regarding the risks faced by the Applicants (*Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 [*Dahal*]; *Akintola v Canada (Citizenship and Immigration)*, 2020 FC 971 [*Akintola*]; *Zamor v Canada (Citizenship and Immigration)*, 2021 FC 672 [*Zamor*]).

[14] Since *Dahal*, the Supreme Court of Canada has clarified the role of a governing statutory scheme as a legal constraint. *Dahal*'s conclusions must be viewed in light of the evolution of this role as described in *Vavilov* and *Mason*.

[15] *Akintola* and *Zamor* primarily focus on the impropriety of judicial review of an issue that was not dealt with by the RAD. These cases confirm that it is inappropriate for the Court to review alleged RPD errors not raised before the RAD on appeal.

[16] In the present application, by contrast, the Applicants are not asking this Court to review the RPD's findings on their identity-based risk. The Applicants ask the Court to find that the RAD erred by abdicating its responsibility to assess the RPD's conclusion on their identity-based risk, based on the RAD's perception that this issue was unchallenged. The Applicants are challenging the RAD's determination on its scope of authority. This is an appropriate object for reasonableness review (*Vavilov* at para 109).

[17] The RAD quoted the statement from *Akintola* that "[t]he RAD is not required to provide reasons for unchallenged findings" (*Akintola* at para 21). In my view, that statement requires qualification.

[18] Not every unchallenged finding made by the RPD requires review by the RAD. However, the obligation on the RAD to assess unchallenged RPD findings rises with the proximity of those findings to a conclusion on risks faced by appellants. For example, an unchallenged minor evidentiary finding by the RPD may not require a RAD re-assessment. However, an unchallenged RPD analysis of documentary evidence establishing the presence or absence of risk under sections 96 or 97 of the *IRPA* requires the RAD's attention, even if unchallenged.

[19] In a different context, Justice Russel Zinn has described the RAD's obligation to assess relevant but unchallenged adverse credibility findings made by the RPD as follows: "Furthermore, paragraph 111(2)(a) of the Act requires the RAD to assess whether the RPD was 'wrong in law, in fact or in mixed fact and law.' A presumption that unchallenged credibility findings are true would interfere with this statutory obligation. While it may be unwise for an appellant to leave credibility determinations by the RPD unchallenged, this does not relieve the RAD of its role in determining the correctness of the RPD's decision in all relevant matters" (*Derxhia v Canada*

(Citizenship and Immigration), 2018 FC 140 at para 28 [emphasis added]; see also *Ou v Canada (Citizenship and Immigration)*, 2021 FC 268 at para 51).

[20] The RAD's role is to review the RPD's decision, conducting its own independent assessment of the matter and substituting its conclusions "on the merits of the refugee claim" for those of the RPD or agreeing with the RPD on the merits (*Canada (Citizenship and Immigration v Huruglica)*, 2016 FCA 93 [*Huruglica*] at para 103; *Patel v Canada (Citizenship and Immigration)*, 2024 FC 711 at para 21). As stated by the Federal Court of Appeal, "the legislator made it clear that the RPD is not entitled to err, be it in law, in fact, or in mixed fact and law" and "[t]he RAD was essentially viewed as the safety net that would catch all mistakes made by the RPD, be it on the law or the facts" (*Huruglica* at paras 65, 98).

[21] The Court in *Dahal* noted that Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257 [Rules] requires appellants to identify alleged errors committed by the RPD with a high degree of specificity (at para 30). However, these Rules are procedural and can not circumscribe the broad decision-making authority of the RAD as described in sections 110 and 111 of the legislation. The Federal Court of Appeal found this authority to flow from the first objective of the *IRPA* (s 3(2)(a)), which is to recognize that the refugee program is about saving lives and offering protection to the displaced and persecuted (*Huruglica* at para 53). Using Rule 3(3)(g) to impede the provisions in the *IRPA* requiring the RAD's correct determination of the risks faced by claimants results in an elevation of procedure over substance.

[22] Relieving the RAD from deciding unchallenged RPD risk conclusions applies a strictly adversarial model of decision making to the appeal. However, the nature of refugee determination leans toward an inquisitorial rather than adversarial process. The goal of refugee determination is

an accurate assessment of risk, rather than a dispute resolution between competing parties. The obligation of the RAD to assess the RPD's central findings related to risk, regardless of whether they were explicitly challenged, is consistent with this inquisitorial process.

[23] As recognized by the Supreme Court of Canada in *Canada (Attorney General) v Ward* [1993] 2 SCR 689, it is the duty of the examiner to determine whether the Convention refugee definition is met (at 745). The Court relied upon the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status*, which recognizes a shared responsibility of the claimant and examiner in the evaluation of claims (at paras 195–205). This duty applies to the RPD but also to the RAD in the context of an appeal on a correctness standard of review.

[24] The RPD's institutional design reflects this inquisitorial model of decision-making. The RPD member assumes a primary role in the identification of issues and examination of testimony. There is generally no adversarial party present. While the RAD is an appellate body, it would not be consistent with the inquisitorial approach to refugee determination to design an appeal that abandons this approach, placing the onus exclusively on the appellant to advance all issues of risk. Both the RPD and the RAD have an active responsibility to ensure Canada's respect for the principle of *non-refoulement* under international law, which is a "critical legal constraint" in the interpretation and application of the *IRPA*, "one that Parliament has decreed *must* be considered in construing and applying the *IRPA*" (*Mason* at paras 104–117 [emphasis in original]).

[25] There could be many reasons why an RPD risk finding is not challenged before the RAD, such as lack of representation, incompetent representation, or poor strategy. Moreover, as in this case, the RAD could mistakenly perceive that the issue was not raised. The fact that the RAD

normally proceeds without the benefit of oral argument heightens the risk that submissions and arguments are overlooked or left unexamined. It would be inconsistent with Canada's *non-refoulement* obligations to allow the return of a claimant to a well-founded fear of persecution for any of these reasons.

[26] The potential consequences of the RAD's decision-making are too severe to relieve it of the obligation to assess the RPD's risk findings on the basis that they are unchallenged (*Vavilov* at paras 133–135). In this case, the RAD believed it was justified in turning away from an entire basis for the Applicants' fears. Its determination that it was not obligated to deal with the RPD's identity-based risk finding because it was not challenged is unreasonable.

C. *Lack of transparent, intelligible findings on risk*

[27] Despite stating that it was not obligated to review the RPD's unchallenged risk finding, the RAD conducted such a review: "I note, however, that I have reviewed the record and agree with the RPD's findings that the Appellants do not face a serious possibility of persecution or likely section 97(1) harm in Kenya" on the basis of the Applicants' fear of harm from smugglers or as Swahili Muslims.

[28] This general statement of concurrence does not transparently and intelligibly justify the RAD's decision, making it impossible to understand the RAD's opinion that the Applicants alleged discrimination in Kenya did not rise to persecution or harm under sections 96 and 97 of the *IRPA*, respectively (*Pintyi v Canada (Citizenship and Immigration)*, 2021 FC 117 at paras 10–11; *Vavilov* at para 99).

V. Conclusion

[29] While the RAD is not required to assess every finding made by the RPD, it is required to provide justified, transparent, and intelligible reasons supporting or disagreeing with the RPD's risk findings, even if those findings are unchallenged. The RAD's decision is unreasonable for its oversight of the Applicants' submissions raising their identity-based risk and for failing to provide transparent and intelligible reasons regarding the Applicants' risk. I grant this application for judicial review.

JUDGMENT in IMM-11445-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision of the Refugee Appeal Division dated August 25, 2023, is quashed and the matter will be sent back to the Refugee Appeal Division for redetermination by a differently constituted panel.

3. There is no question for certification.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11445-23
STYLE OF CAUSE:	ABDULRAHMAN ABDULLATIF MOHAMED ET AL. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 3, 2024
JUDGMENT AND REASONS:	BATTISTA J.
DATED:	OCTOBER 11, 2024

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